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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 414

**UNION PACIFIC RAILROAD COMPANY,
PETITIONER,**

vs.

L. L. PRICE

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**PETITION FOR CERTIORARI FILED OCTOBER 2, 1958
CERTIORARI GRANTED NOVEMBER 17, 1958**

No. 15649

United States
Court of Appeals
for the Ninth Circuit

L. L. PRICE,

Appellant,

vs.

UNION PACIFIC RAILROAD;

Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Nevada



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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For the Appellee.

In the District Court of the United States
for the District of Nevada

No. 117

L. L. PRICE,

Plaintiff,

vs.

UNION PACIFIC RAILROAD, Defendant.

COMPLAINT

I.

Plaintiff is a citizen of the State of Nevada and defendant is a corporation incorporated under the laws of the State of Utah. The matter in controversy, exceeds, exclusive of interest and costs, the sum of Three Thousand (\$3,000.00) Dollars.

II.

Plaintiff was employed by defendant as a trainman from on or about September 11, 1942, until he was notified by defendant on or about July 24, 1949, that he was dismissed.

III.

For many years prior to and until the said dismissal, plaintiff was a member of the Brotherhood of Railway Trainmen.

IV.

From April 1, 1943, up to and including July 24, 1949, there was in effect a written collective bargaining agreement and other written agreements between the said Brotherhood of Railway Trainmen

and defendant. Plaintiff duly performed all terms and conditions of the said agreements required on his part to be performed.

V.

The dismissal of plaintiff by defendant was wrongful and in violation of the said agreements in the following respects:

(a) There was no thorough investigation made of alleged faults on the part of plaintiff.

(b) Plaintiff was not afforded an opportunity to have a trainman of his choice present at the investigation held.

(c) Plaintiff was not afforded a reasonable opportunity to prepare his defense.

(d) Plaintiff was not afforded a reasonable opportunity to present his defense at the said investigation.

(e) Plaintiff was not present at the said investigation.

(f) Plaintiff was not afforded an opportunity to have witnesses present in his behalf at the said investigation.

(g) Plaintiff was denied the right to have witnesses present in his behalf at the said investigation at the expense of defendant.

(h) Plaintiff was not afforded a reasonable opportunity to participate in his own defense at the said investigation.

(i) Plaintiff was dismissed without cause.

VI.

As a direct and proximate result of said wrong-

Union Pacific Railroad

ful dismissal, plaintiff has at the time of the filing of this complaint lost earnings in the amount of \$18,517.00.

VII.

As a direct and proximate result of said wrongful dismissal, plaintiff will lose future earnings and valuable seniority, retirement, hospitalization, and transportation rights.

Wherefore, plaintiff demands judgment against defendant in the sum of One Hundred and Eighteen Thousand Five Hundred and Seventeen (\$118,517.00) Dollars, and costs.

RALLI, RUDIAK & HORSEY,

/s/ By **SAMUEL S. LIONEL,**
Attorneys for Plaintiff.

[Endorsed]: Filed June 6, 1955.

National Railroad Adjustment Board
First Division

Docket No. 27393

Parties to Dispute: Brotherhood of Railroad Trainmen, Union Pacific Railroad Company (South Central District).

EMPLOYEES' SUBMISSION EX PARTE

Statement of Claim

Claim for restoration to service with all rights unimpaired and for pay for all time lost for Brakeman L. L. Price since July 13, 1949.

Statement of Facts

On July 12, 1949, Brakeman L. L. Price regularly assigned to the brakemen's extra board at Las Vegas, Nevada, which protects extra service in both directions from Las Vegas, Nevada, was called to deadhead on train No. 37, a passenger train, from Las Vegas, Nevada, to Nipton, California, a station en route 56.7 miles west of Las Vegas, for swing service. Train No. 37 arrived at Nipton, California, at 10:30 P.M. on July 12. Brakeman Price immediately contacted the train dispatcher at Nipton, and was advised that his services as swing brakeman (a third brakeman who is not a regularly assigned member of the crew) from Nipton, California, would be utilized on extra 1622 east which was due to arrive at Nipton at about 4:30 A.M.. Brakeman Price informed the train dispatcher that he was returning to Las Vegas, Nevada, for the purpose of securing food, there being no eating facilities at Nipton or at any point en route between Nipton and Las Vegas. Brakeman Price returned to Las Vegas on extra 1623 east at 12:35 A.M. on July 13.

After obtaining food, Brakeman Price called the train dispatcher and advised him that he (Brakeman Price) was ready to return to Nipton on a freight train due to depart from Las Vegas at 1:45 A.M. The train dispatcher instructed Brakeman Price at that time that he need not return to Nipton. Upon receipt of such instructions, Brakeman Price properly registered in on the brakemen's register book at Las Vegas and returned to his

home. Brakeman Price was held from service effective at 9:05 A.M. on July 13, and at 7:00 P.M. on July 16 he received a notice to appear for an investigation at 10:00 A.M. on July 17, as indicated in Employees' Exhibit B.

On July 17 Brakeman Price consented to postponement of the investigation until 9:30 A.M. on July 18, as indicated in Employees' Exhibit C. On July 18 Brakeman Price appeared for the investigation and requested postponement until his representative (B.R.T. Local Chairman) could be present to represent him, as indicated in Employees' Exhibit D. On July 24, 1949, Brakeman Price was discharged from the services of the carrier.

Position of Employees

That Brakeman L. L. Price was dismissed from service unjustly and without recourse in violation of the agreement under which he was working at the time of his dismissal is supported by the provisions of Section (a) of Article 33 of the agreement effective April 1, 1943, governing wages and working conditions of conductors, brakemen, and train baggagemen, reading as follows:

"When a trainman is suspended for an alleged fault, no punishment will be fixed without a thorough investigation, at which the accused may have a trainman of his choice present. Ordinarily such an investigation will be held within seven (7) days from date of suspension; if found innocent he will be reinstated and paid for time lost. All witnesses shall, after giving

their testimony at an investigation, remain present during the continuance of such investigation. Copy of his statement will be furnished, which employee must sign. Transcript of testimony of all witnesses will be furnished to the General Chairman upon request when discipline is administered."

That portion of the above rule reading:

"* * * no punishment will be fixed without a thorough investigation, at which the accused may have a trainman of his choice present."

(Underscore ours)

was grossly ignored by the carrier in dismissing Brakeman Price.

The employees contend that that portion of the Notice of Hearing, identified herein as Employees' Exhibit B, reading as follows:

"You may produce such witnesses as you may desire, at your expense."

is contrary to the above referred to Section (a) of Article 33 and is in no way a part of the agreement between the employees and the carrier and that this portion of the Notice of Hearing was, within itself, the principal contributor to the request for the first postponement, identified herein as Employees' Exhibit C. Witnesses whose testimony was considered pertinent in developing the facts relative to the carrier's charges against Brakeman Price were not available at Las Vegas on July 17. As indicated on

page 3 of Employees' Exhibit A in the following question and answer:

"Q. Was he advised that the investigation would be deferred until 2:30 P.M. today for him to get some other representative?

"A. Yes, sir."

representatives of the carrier were obviously aware that the Local Chairman was not available in Las Vegas and that it was Brakeman Price's desire to have the Local Chairman represent him. The arbitrary action of the carrier's representatives is indicative of their deliberate attempts to deprive Brakeman Price of an investigation in accordance with the agreement under which he was employed.

The employees further contend that Brakeman Price did not violate any rules in leaving Nipton to secure food. That Brakeman Price was justified in these actions is supported by the provisions of Section (b) of Article 32 of the agreement effective April 1, 1943, reading as follows:

"Swing brakemen will not be tied up nor released at points where sleeping and eating accommodations are not available."

It is questionable whether the services of Brakeman Price as swing brakeman were needed at all at Nipton on the date in question, and it is apparent that his services were not needed at a time which would necessitate his being deadheaded from Las Vegas on train No. 37. It will be noted that his services were never utilized from Nipton to Las Vegas and neither was any other brakeman sent

from Las Vegas to protect the services originally intended for Brakeman Price.

It is further interesting to note that at the time of this incident (July 12, 1949) representatives of the carrier had arbitrarily, without negotiation, set up a condition wherein swing brakemen (a third brakeman who is not a regularly assigned member of the crew) would detrain at Nipton, California, a station en route, without satisfactory eating and sleeping facilities and without any eating facilities during the hours from 8:00 P.M. to 6:00 A.M. Such arbitrary action of the carrier's representatives, in their efforts to nullify the provisions of Section (b) of Article 32 governing tie-ups and releases of swing brakemen, resulted in a dispute which prompted the employees' representatives to request that the National Mediation Board take jurisdiction. At the time of the occurrence resulting in this controversy, negotiations were being conducted in Salt Lake City, Utah, with the assistance of a member of the National Mediation Board and the Assistant to the President of the Brotherhood of Railroad Trainmen, in National Mediation Board Case No. 3172. Such negotiations resulted in the consummation of the agreement attached hereto and identified as Employees' Exhibit K.

In further support of the employees' contentions enumerated herein is a copy of the transcript of the so-called investigation conducted by officers of the carrier, the employees not participating, identified as Employees' Exhibit A; the carrier's Notice of Hearing dated July 16, 1949, identified as Em-

Employees' Exhibit B; postponement of investigation scheduled for July 17, identified as Employees' Exhibit C; request for postponement of investigation on July 18, identified as Employees' Exhibit D; General Chairman's submission to the General Manager under date of March 27, 1950, identified as Employees' Exhibit E; General Manager's reply to General Chairman under date of March 30, 1950, identified as Employees' Exhibit F; General Chairman's reply to the General Manager on April 5, 1950, identified as Employees' Exhibit G; the General Manager's position, subsequent to conference, dated May 22, 1950, identified as Employees' Exhibit H; General Chairman's letter of May 31, 1950, to General Manager requesting joint submission to the First Division of the National Railroad Adjustment Board, identified as Employees' Exhibit I; General Manager's reply of July 5, 1950, identified as Employees' Exhibit J; Mediation Agreement No. 3172 dated July 15, 1949, identified as Employees' Exhibit K.

The entire text of the charges against Brakeman Price and his subsequent removal from service are indicative of unjust discrimination against one employee, and we earnestly request that your Honorable Board so declare by rendering an affirmative award in this case.

It is affirmed that all data submitted herein in support of our position has heretofore been presented to the representative of the carrier, and is hereby made a part of the question in dispute.

Oral hearing is waived unless requested by representatives of the carrier.

Brotherhood of Railroad Trainmen,
Union Pacific Railroad Company,
(South Central District),

By

L. E. Foley,
General Chairman.

.EMPLOYEES' EXHIBIT A

Investigation and hearing conducted in office of Assistant Superintendent, Las Vegas, Nevada, with Brakeman L. L. Price, in connection with his failure to protect his assignment as Swing Brakeman at Nipton, Calif., on July 12th, 1949, and dead-heading from Nipton to Las Vegas without proper authority, constituting violation of Operating Rules 700 and 702; investigation convened at 10:00 A.M., July 17th, 1949, but postponed at request of Brakeman Price until 9:30 A.M., July 18th, 1949; further postponed until 2:30 P.M., July 18th, 1949, to permit Brakeman Price to secure representation.

Present: W. B. Groome, Asst. Supt.; N. D. Nelson, Trainmaster.

Witnesses: L. L. Price, Brakeman; R. L. Gundy, Asst. Chief Dispr.; G. J. Wilde, Asst. Chief Dispr.; L. L. Rose, CTC Dispatcher; A. L. Dixon, Chief Crew Dispr.; S. M. Smith, Chief Clerk to Asst. Supt.

Reported by: S. M. Smith, Chief Clerk to Asst. Supt.

Exhibit A—(Continued)

Questions by Mr. Groome:

Statements by Mr. Price:

Q. Mr. Price, your notice of investigation and hearing, dated Las Vegas, July 16th, 1949, reads as follows:

“Please report at the office of the Assistant Superintendent, in the depot building, Las Vegas, Nev., on July 17th, 1949, at 10:00 A.M., for investigation and hearing on charges that you refused to protect your assignment as Swing Brakeman at Nipton, Calif., on July 12th, 1949, and deadheaded from Nipton to Las Vegas, Nev., without authority, constituting violation of Operating Rule 700, specifically, insubordination, and Operating Rule 702, specifically, failure to comply with instructions from proper authority and absenting yourself from duty without proper authority.

“The investigation and hearing will be conducted in conformity with the provisions of Article 33 of the agreement effective April 1st, 1943, between the Company and the ORC-BofRT, and you are entitled to representation as provided in that Article.

“You will be withheld from service pending the outcome of this investigation and hearing.

“You may produce such witnesses as you may desire, at your expense.

“Signed: W. B. Groome, Asst. Supt.”

Mr. Price, was this notice of investigation and hearing received by you within the time provided in your schedule?

A. Yes, sir.

Exhibit A—(Continued)

Q. Do you desire representation?

A. I do.

Q. Is your representative present?

A. No, sir.

Q. Is it your desire to request postponement of this investigation until you produce your representative? A. It is.

Q. The investigation is postponed until 9:30 A.M., July 18th, 1949, and it will be necessary for you to sign Form "C" requesting postponement of the investigation until that time.

I have read the above and it is correct:

/s/ L. L. Price,
Brakeman.

Transcript correct:

/s/ S. M. Smith,
Chief Clerk to Asst. Supt.

(Investigation recessed at 10:15 A.M., July 17th, 1949.)

(Investigation reconvened at 2:30 P.M., July 18th, 1949, with Brakeman L. L. Price in absentia.)

Mr. Groome:

On July 16th, 1949, the following notice of hearing was issued to L. L. Price, Brakeman, Las Vegas, Nevada, reading as follows:

"Please report at the office of the Assistant Superintendent, in the depot building, Las Vegas, Nev., on July 17th, 1949, at 10:00 A.M., for investigation and hearing on charges that you refused to protect your assignment as Swing Brakeman at

Exhibit A—(Continued)

Nipton, Calif., on July 12th, 1949, and deadheaded from Nipton to Las Vegas, Nev., without authority, constituting violation of Operating Rule 700, specifically, insubordination, and Operating Rule 702, specifically, failure to comply with instructions from proper authority and absentsing yourself from duty without proper authority.

"The investigation and hearing will be conducted in conformity with the provisions of Article 33 of the agreement effective April 1st, 1943, between the Company and the ORC-BofRT, and you are entitled to representation as provided in that Article.

"You will be withheld from service pending the outcome of this investigation and hearing.

"You may produce such witnesses as you may desire, at your expense.

"Signed: W. B. Groome, Asst. Supt."

On July 17th, 1949, the following consent to postponement, addressed to W. B. Groome, Asst. Superintendent, Las Vegas, Nev., was signed by Brakeman L. L. Price, reading as follows:

"Please refer to the notice of investigation and hearing which you sent to me under date of July 16th, 1949.

"I hereby consent to the postponement of this investigation and hearing until July 18th, 1949, commencing at 9:30 A.M., and agree that such postponement shall not affect the validity of such hearing in any way.

"Signed: L. L. Price, Brakeman."

Exhibit A—(Continued)

Questions by Mr. Groome:

Statements by Mr. Smith:

Q. Mr. Smith, you have been called as a carrier witness in this investigation. Will you state your name and occupation?

A. S. M. Smith, Chief Clerk to Asst. Superintendent, Las Vegas.

Q. Did Brakeman L. L. Price request a further postponement of the investigation, which had been postponed at his request until 9:30 A.M. today?

A. Yes, sir.

Q. What was his reason for asking for a further postponement?

A. He claimed that Mr. E. C. Grounds, his representative, was in Milford, Utah, and he did not desire to have the investigation until Grounds' return.

Q. Was he advised that the investigation would be deferred until 2:30 P.M. today for him to get some other representative?

A. Yes, sir.

Q. Did Brakeman Price show up at 2:30 P.M.?

A. No, sir.

Q. Did he hand you the following letter, addressed to Mr. W. B. Groome, dated Las Vegas, July 18th, 1949, reading as follows:

"Referring to notice of investigation originally set for 10:00 A.M., July 17th, and postponed at my request until 9:30 A.M., July 18th:

"I hereby request further postponement until my representative, Mr. E. C. Grounds, is in Las Vegas.

"Signed: L. L. Price."

Exhibit A—(Continued)

A. Yes, sir. He asked me to write that letter for him.

I have read the above and it is correct:

/s/ S. M. Smith,

Chief Clerk to Asst. Supt.

Mr. Groome:

In view of the fact that Brakeman Price has not appeared at 2:30 P.M., as directed by me, the investigation and hearing will proceed with Brakeman Price in absentia.

Questions by Mr. Groome:

Statements by Mr. Rose:

Q. Mr. Rose, you have been called as a witness for the carrier in this particular case. Please state your name and occupation.

A. L. L. Rose, Train Dispatcher, Las Vegas.

Q. Were you working as the CTC Train Dispatcher between Las Vegas and Yermo on July 12th, 1949?

A. Yes, sir.

Q. Do you recall the case of Brakeman L. L. Price being deadheaded on train No. 37 for swing brakeman service to Nipton, Calif., on that date?

A. Yes, sir.

Q. Are brakemen required by Superintendent's Circular instructions to contact the train dispatcher after arriving at Nipton?

A. Yes, sir.

Q. Did Brakeman Price contact you after arriving at Nipton on No. 37 July 12th?

A. Yes, sir.

Q. What instructions did you give him?

Exhibit A—(Continued)

A. I instructed Brakeman Price to protect X 1622 E, which would arrive Nipton about 4:00 A.M., but told him to call in at 3:20 A.M. so that if the DLS train arrived Nipton in time for X 1622 E the dispatcher on duty might deadhead him back to Las Vegas on No. 38.

Q. Did Brakeman Price comply with your instructions? A. No.

Q. What did he do?

A. Brakeman Price deadheaded to Las Vegas on X1623E.

Q. Do you recall what time X1623E was by Nipton? A. No, I don't.

Q. The report submitted by Asst. Chief Dispatcher Gundy is to the effect that No. 37, on which Swing Brakeman Price deadheaded to Nipton, arrived there at 10:25 P.M., and the MSF train, X1623E, arrived Nipton at 11:10 P.M. Is that approximately correct? A. That is about right.

Q. Did Brakeman Price take exception to the instructions you gave him? A. Yes.

Q. Briefly, what was the phone conversation you had with him, as you recall it?

A. Brakeman Price said there was no place to eat or sleep at Nipton, and that he was returning to Las Vegas on the first eastbound train.

Q. Did you have any further conversation with him? A. No.

Q. Did Asst. Chief Dispatcher, Mr. Gundy, then talk with him? A. Yes.

Exhibit A—(Continued)

Q. To your knowledge, did Brakeman Price return to Las Vegas on the MSF train? X 1623 E?

A. I have no way of knowing that.

Q. Did Brakeman Price make it plain to you he was returning to Las Vegas on the next east-bound train?

A. Yes, sir.

Q. And you had previously advised him there was a possibility he would be deadheaded from Nip-ton to Las Vegas on No. 38?

A. Yes, sir.

I Have Read The Above and It Is Correct:

/s/ L. L. Rose,

Train Dispatcher.

Transcript Correct:

/s/ S. M. Smith,

Chief Clerk to Asst. Supt.

Questions by Mr. Groome:

Statements by Mr. Dixon:

Q. Mr. Dixon, you have been called as a carrier witness in this particular case. Please state your name and occupation.

A. A. L. Dixon, Chief Crew Dispatcher, Las Vegas.

Q. Is the handling of train crews at Las Vegas, including swing brakemen, your responsibility?

A. Yes, sir.

Q. Do you have certain records which would give the movements of swing brakeman Price out of Las Vegas July 12th, 1949?

A. Yes, sir.

Q. What do your records disclose as to Brake-man Price moving out of Las Vegas on that date?

Exhibit A—(Continued)

A. He was called to deadhead on Train 37, 9:15 P.M., July 12th, 1949, to Nipton, Calif., for swing service.

Q. Deadheading on No. 37, what would be his time on duty? A. 9:15 P.M.

Q. And do you have any other records in your office which would give the arrival time of Brakeman Price from Nipton? A. Yes, sir.

Q. What record do you have to indicate his arrival time?

A. We have the Extra Brakemen's Register of Arrival, which every extra brakeman is required to register on when they arrive Las Vegas.

Q. What is the purpose of having the extra brakemen register on this particular form.

A. So that they will be marked up on the board in the proper order, in accordance with their agreement.

Q. Is that the responsibility of the carrier, to see that brakemen are marked up in their proper order? A. Yes, sir.

Q. Is this sheet prepared on a daily basis?

A. Yes, sir.

Q. I hand you herewith a mimeographed form, "Extra Brakemen's Register of Arrival," for July 13th, 1949. Is Brakeman L. L. Price registered on that form? A. Yes, sir.

Q. What time is he shown as arriving Las Vegas? A. 12:35 A.M., deadhead, on X 1623 E.

Exhibit A—(Continued)

Questions by Mr. Groome:

Q. And the fact that Brakeman Price registered as arriving on X 1623 E, at 12:35 A.M., would that mean to you he had arrived on that particular train? A. Yes, sir.

Q. Is there any other item on your mimeographed form of the extra brakemen's register of arrival, July 13th, concerning Brakeman L. L. Price? A. No, sir.

Q. Is it apparent to you that the only train he arrived at Las Vegas on on July 13th, 1949, was X 1623 E, at 12:35 A.M.? A. Yes, sir.

Q. Are you familiar with Form 2639, commonly known as conductor's train book? A. Yes, sir.

Q. I hand you herewith train book of Conductor W. E. Montgomery, covering his trip from Yermo to Las Vegas on July 13th, 1949, with X 1622 E, departing from Yermo at 1:40 A.M. and arriving Las Vegas 9:05 A.M., July 13th. Will you state for the record, and from Conductor Montgomery's train book, the brakemen he had into Las Vegas?

A. Brakemen E. E. Spainhower, H. C. Jackson and G. E. White.

Q. Is there any record of Brakeman L. L. Price on that particular train? A. No, sir.

I Have Read The Above and It Is Correct:

/s/ A. L. Dixon,

Chief Crew Dispatcher.

Transcript Correct:

/s/ S. M. Smith,

Chief Clerk to Asst. Supt.

Exhibit A—(Continued)

Questions by Mr. Groome:

Statements by Mr. Smith:

Q. Mr. Smith, on my instructions did you contact the Timekeeping Bureau at Los Angeles and have them ascertain from the records of the Company on file at that point who was the Swing Brakeman, shown by Conductor L. T. Robertson, on X 1600 W, symbol 4-MLA-8, departing Las Vegas 1:15 A.M., July 13th, 1949? A. Yes, sir.

Q. Who was the Swing Brakeman shown by Conductor Robertson?

A. Brakeman G. E. White.

Questions by Mr. Groome:

Statements by Mr. Smith:

Q. And did you have them advise also who the Swing Brakeman was shown by Conductor W. E. Montgomery, on X 1622 E, from Nipton to Las Vegas, on that date?

A. Yes, sir. That was also Brakeman G. E. White.

Q. Did the Timekeeper secure this information from Form 5031, the time slips submitted by these two conductors?

A. Yes, sir. He told me to wait until he got their time slips.

Q. Did either time slip show any other brakeman in swing service between Las Vegas and Nipton, other than Brakeman G. E. White?

A. No, sir. Not according to the information given me.

Exhibit A—(Continued)

I Have Read The Above and It Is Correct:

/s/ S. M. Smith,

Chief Clerk to Asst. Supt.

Transcript Correct:

/s/ S. M. Smith,

Chief Clerk to Asst. Supt.

Questions by Mr. Groome:

Statements by Mr. Dixon:

Q. Mr. Dixon, do you have any record to show the last arrival and departure time of Mr. E. C. Grounds, who was desired by Brakeman Price as his representative? A. Yes, sir.

Q. Would you state when he arrived at Las Vegas on July 16th, 1949?

A. At 7:50 P.M., July 16th.

Q. And departed when?

A. 8:00 P.M., July 17th.

Q. Was Mr. Grounds rested at 10:00 A.M., July 17th? A. Yes, sir.

I Have Read The Above and It Is Correct:

/s/ A. L. DIXON,

Chief Crew Dispatcher.

Questions by Mr. Groome:

Statements by Mr. Smith:

Q. Mr. Smith, did Mr. Price volunteer any information to you as to why he did not have his representative at 10:00 A.M., July 17th, for the investigation as it has been stated by Chief Crew Dispatcher Dixon his representative was in town?

Exhibit A—(Continued)

Questions by Mr. Groome:

Statements by Mr. Smith:

A. He stated the reason he wanted the investigation postponed until July 18th was because his witness, Brakeman L. L. Cook, was called for 10:00 A.M., July 17th, and he didn't want to have to pay him for laying off to attend the investigation as his witness.

I have Read The Above and It Is Correct:

/s/ S. M. Smith,

Chief Clerk to Asst. Supt.

Questions by Mr. Nelson:

Statements by Mr. Wilde:

Q. Mr. Wilde, you have been called as a carrier witness in connection with this case. Please state your name and occupation.

A. George J. Wilde, Train Dispatcher.

Q. Were you Asst. Chief Dispatcher, on duty Las Vegas 11:30 P.M., July 12th, to 7:30 A.M., July 13th, 1949? A. Yes, sir.

Q. And during your tour of duty on those dates did you have conversation with Brakeman L. L. Price? A. I did.

Q. About what time was this, Mr. Wilde?

A. Shortly after midnight, July 13th.

Q. What conversation did you have with Brakeman Price?

A. First of all he said, this is Brakeman Price. He said, I came into Las Vegas to eat. Do you

Exhibit A—(Continued)

want me to go back out on this MLA to protect the UX connection at Nipton.

Q. Was this on the phone, or personal contact?

A. On the telephone.

Q. Do you know where he was calling from?

A. Not definitely.

Q. You assumed him to be calling from the yard office?

A. From the Crew Dispatcher's office.

Q. Did he inform you he had arrived Las Vegas from Nipton, or did he tell you how he had arrived here?

A. He didn't tell me how.

Q. Did he give you any particulars at all?

A. No, sir. He said he came into Las Vegas to eat.

Q. Had you been informed by the afternoon Asst. Chief Dispatcher, whom you relieved at 11:30 P.M., of the performance of Brakeman L. L. Price at Nipton?

A. Yes, sir.

Q. It was your understanding that he returned deadhead from Nipton on the MSF train, leaving there about 11:10 P.M. and arriving Las Vegas shortly after midnight?

A. Yes, sir.

Q. You instructed him he definitely was not to return to Nipton?

A. That is right. I told him exactly, it would not be necessary.

Q. You made it very plain to him?

A. Yes, sir.

Q. Was he arbitrary with you on the phone?

A. No, sir.

Exhibit A—(Continued)

Q. Did he tell you on the phone why he left Nipton?

A. No, sir. Other than that he came to Las Vegas to eat.

I Have Read The Above and It Is Correct:

/s/ G. J. Wilde,

Train Dispatcher.

Transcript Correct:

/s/ S. M. Smith,

Chief Clerk to Asst. Supt.

Questions by Mr. Nelson:

Statements by Mr. Gundy:

Q. Mr. Gundy, you have been called as a carrier witness in this investigation. Please state your name and occupation.

A. Richard L. Gundy, Asst. Chief Dispatcher.

Q. Were you Asst. Chief Dispatcher at Las Vegas July 12th, 1949, from 3:30 P.M. to 11:30 P.M.?

A. Yes, sir.

Q. During those hours did you instruct that a swing brakeman be deadheaded on train No. 37 to Nipton, Calif., for swing service?

A. I did.

Q. And was Brakeman L. L. Price called for this assignment?

A. Yes, sir.

Q. Did he make the trip Las Vegas to Nipton on train 37?

A. Yes, sir.

Q. Arriving there about 10:25 P.M.?

A. Yes, sir.

Q. On arrival at Nipton did he contact Train Dispatcher Rose?

A. Yes, sir.

Exhibit A—(Continued)

Q. Did you have a phone conversation with Brakeman Price from Nipton?

A. Yes. After Price came back from trying to find some place to eat and told the Dispatcher he was coming back from Nipton to Las Vegas.

Q. What were Train Dispatcher Rose's instructions to Brakeman Price at Nipton on his arrival there?

A. That he protect a train arriving Nipton about—I believe it was 4:00 A.M.

Q. He was not released? A. No.

Q. Did he give Train Dispatcher Rose some argument?

A. Yes. He told him someone had to call him. He wanted an hour and a half call.

Q. But he was instructed by Train Dispatcher Rose to remain there and protect the UX, to arrive there approximately 4:00 A.M.? A. Yes.

Q. Did you talk with Brakeman Price on the phone after Dispatcher Rose had talked with him?

A. I did. I told Price if I were him I would protect the train and handle any grievance through his organization, as it should be handled.

Q. How did Brakeman Price reply to you?

A. I think he said, "Thank you, but I am going back to Las Vegas on the first train account no place to eat here."

Q. Did you give him positive instructions to remain there and protect the UX?

A. I told him that was his assignment, to pro-

Exhibit A—(Continued)

tect the UX, and if I were him I would not come back to Las Vegas and leave it unprotected.

Q. And you did not relieve him to return from Nipton to Las Vegas on the MSF?

A. No, sir.

Q. Do you know whether he came in on the MSF or not?

A. No. I don't. I wouldn't say whether he did or whether he protected the UX, because after I went home I didn't pay any more attention to it.

Q. You had no further conversation with Brakeman Price?

A. No, sir. I went home shortly after that.

Q. Is there any other information you have, Mr. Gundy, that might have any bearing on this case?

A. No. I think not. That is about all the conversation I had with him.

Q. Brakeman Price, then, did not comply with your instructions at Nipton?

A. As far as I know, he did not.

I Have Read The Above and It Is Correct:

/s/ R. L. GUNDY,

Asst. Chief Dispatcher.

Transcript Correct:

/s/ S. M. Smith,

Chief Clerk to Asst. Supt.

Mr. Groome:

As Brakeman Price, with his representative, did not appear at this investigation as directed there

Exhibit A—(Continued)

is no one present to present evidence or witnesses on his behalf. The investigation is closed. The evidence will be transcribed and carefully considered and Brakeman Price will be advised of the result of the investigation in due course.

Transcript Correct:

/s/ S. M. Smith,

Chief Clerk to Asst. Supt.

[Note: Exhibit B "Notice of Hearing" is set out at pages 14-15. Exhibit C "Consent to Postponement" at page 15 and Exhibit D "Request For Further Postponement" at page 16.

EMPLOYEES' EXHIBIT E

March 27, 1950

File No. 7-P-37

Mr. F. C. Paulsen

General Manager

Union Pacific Railroad Company

10 South Main Street

Salt Lake City 1, Utah

Re: Brakeman L. L. Price—request for reinstatement with all rights unimpaired and pay for time lost subsequent to July 13, 1949.

Dear Sir:

Decision of Superintendent D. F. Wengert, file No. PR-41949, being unsatisfactory, appeal is hereby taken.

Statement of Facts:

On July 16, 1949, Brakeman L. L. Price, regularly assigned to the brakemen's extra board at Las Vegas, Nevada, received notice to appear at the office of the assistant superintendent at Las Vegas, Nevada, at 10:00 A.M. on July 17, 1949, for an investigation on charges that he (Brakeman Price) refused to protect an assignment as swing brakeman at Nipton, California, on July 12, 1949, etc. On July 17, 1949, Brakeman Price consented to a postponement of the investigation until 9:30 A.M. on July 18. On July 18, 1949, Brakeman Price notified the assistant superintendent that the representative of his choice (B.R.T. Local Chairman E. C. Grounds) was engaged in making a trip from Las Vegas, Nevada, to Milford, Utah, and return in the services of the Union Pacific Railroad Company, and Brakeman Price requested that the above referred to investigation be postponed until such time as the representative of his choice (B.R.T. Local Chairman E. C. Grounds) was available. On July 24, 1949, Brakeman Price was notified that he was discharged from the service of the Union Pacific Railroad Company. Brakeman Price was withheld from service from July 13, 1949. Brakeman Price was present at the office of the assistant superintendent at 10:00 A.M. on July 17 and at 9:30 A.M. on July 18, 1949.

Position of Committee

Paragraph (a) of Article 33 of the agreement ef-

fective April 1, 1943, under which Brakeman L. L. Price was employed, reads in part as follows:

“When a trainman is suspended for an alleged fault, no punishment will be fixed without a thorough investigation, at which the accused may have a trainman of his choice present.” (Underscores added.)

The intent and purpose of the removal from service of Brakeman Price without affording him a thorough investigation and an opportunity to have present a trainman of his choice is as yet not clear to this committee. However, the above facts reveal conclusively that Brakeman Price was removed from service without recourse, without a thorough investigation, without an opportunity to secure the representative of his choice, and without regard for the provisions of the agreement under which he is employed, and this is obviously not consistent with the normal procedure used on this property in securing facts which would sustain the alleged charges.

The removal of a trainman from service in this manner is indicative of the desire of the representatives of the carrier to disregard that portion of the agreement covering investigations in its entirety. Such action, in our opinion, is comparable to Kangaroo Court persecution. That cannot be condoned by this committee, and you are hereby requested to reinstate Brakeman L. L. Price immediately with all rights unimpaired and to reimburse him for any and all losses in earnings that may have accrued

as a result of these above referred to actions on the part of the carrier's representatives.

I shall appreciate your investigation, advising.

Very truly yours,

L. E. Foley,

General Chairman—BRT.

LEF:dl

cc: Mr. L. L. Price

Mr. E. C. Grounds

Mr. E. R. Johnson

EMPLOYEES' EXHIBIT "F"

Union Pacific Railroad Company

Department of Operation

At Milford, Utah

March 30, 1950

011.221

Mr. L. E. Foley

General Chairman, BRT

225 Bartlett Building

215 West Seventh St.

Los Angeles 14, Calif.

Dear Sir:

Referring to your letter of March 27, file 7-P-37, regarding the case of Brakeman L. L. Price, requesting reinstatement with all rights unimpaired and pay for all time lost subsequent to July 13, 1949:

Brakeman Price was dismissed from service for

refusing to protect his assignment as swing brakeman at Nipton, California, on July 12, 1949, and deadheaded from Nipton to Las Vegas, Nevada without authority, constituting violation of Operating Rule 702. The violation for which Brakeman Price was dismissed was a serious one. He apparently had no sense of responsibility, and investigation was held covering his violation and the only reason he did not participate in that investigation is because he elected not to, as he was given every opportunity to do so.

If there is any merit to your claim, it is not understood why you elected to delay your request for a period of over eight months for his reinstatement on the basis outlined. There is possibly a reason for so handling; if there is, I shall be glad to receive advice as to what it is, as I have met with you in conference a number of times since the occurrence.

Believing the discipline has had the desired effect, I am agreeable to return Brakeman Price to service on a leniency basis.

Yours Truly,

/s/ F. C. Paulsen.

EMPLOYEES' EXHIBIT "G"

April 5, 1950

File 7-P-37

Mr. F. C. Paulsen

General Manager

Union Pacific Railroad Company

10 South Main Street

Salt Lake City 1, Utah

Re: Brakeman L. L. Price—request for reinstatement with all rights unimpaired and pay for time lost subsequent to July 13, 1949.

Dear Sir:

This will acknowledge receipt of yours of March 30, 1950, your file 011.221, with reference to the above captioned case, the second paragraph of which sets forth your reasons for the dismissal of Brakeman Price. However, it does not explain why a so-called investigation was conducted without affording Brakeman Price an opportunity to secure a representative of his choice.

The third paragraph of your letter indicates possible exceptions being taken to the delay in the handling of this case. If there is no merit to our claim, I am at a loss to understand what difference any delay connected therewith would make.

Notwithstanding these differences, this will advise that this committee cannot accept your proffer to reinstate Brakeman Price on a leniency basis and the case will be docketed for discussion in our next conference.

Very truly yours,

L. E. Foley,

General Chairman—BRT.

LEF:dl

cc: Mr. J. O. Blackford

Mr. E. R. Johnson

EMPLOYEES' EXHIBIT "H"

Union Pacific Railroad Company
Department of Operation

Salt Lake City 1, Utah

May 22, 1950

011.221

Mr. L. E. Foley

General Chairman, BRT

1129 Bartlett Building

215 West Seventh St.

Los Angeles 14, Calif.

Dear Sir:

Referring to my letter of March 30, File 011.221, and our conference today relative to the case of Brakeman L. I. Price whose reinstatement you request with all rights unimpaired and pay for all time lost subsequent to July 13, 1949:

As stated to you in conference, Brakeman Price automatically severed his relationship with the Company when he walked off his assignment. It was my thought the discipline assessed would have the desired effect and I agreed to return Brakeman

Price to service on a leniency basis. I am not in a position to accede to your request that he be paid for all time lost. To do so would indicate I was agreeable to permitting employees to perform as they saw fit, regardless of how it affected the operation or welfare of the organization as a whole.

Yours truly,

/s/ F. C. Paulsen.

EMPLOYEES' EXHIBIT "I"

May 31, 1950

File No. 7-P-37

Mr. F. C. Paulsen

General Manager

Union Pacific Railroad Company

10 South Main Street

Salt Lake City 1, Utah

Re: Brakeman L. L. Price—request for reinstatement with all rights unimpaired and pay for time lost subsequent to July 13, 1949.

Dear Sir:

Your letter of May 22, 1950, your file 011.221, setting forth your position relative to the above captioned case after our discussion while in conference in Salt Lake City on May 22, is not acceptable. The committee's contention, as set forth in our letter of March 27, 1950, that Brakeman Price was removed from service without a proper and thorough investigation provided for in Article 33

of the agreement effective April 1, 1943, has not changed.

You are, therefore, hereby requested to join us in a submission of this case to the First Division of the National Railroad Adjustment Board and to fix a date, time, and place for our meeting in an effort to agree upon a joint statement of facts in connection therewith.

Very truly yours,

L. E. Foley,

General Chairman—BRT.

LEF:dl

cc: Mr. J. O. Blackford

Mr. E. R. Johnson

EMPLOYEES EXHIBIT "J"

Union Pacific Railroad Company
Department of Operation

Salt Lake City 1, Utah

July 5, 1950

011.221

Mr. L. E. Foley
General Chairman, BRT
1129 Bartlett Building
Los Angeles 14, California

Dear Sir:

Your letter May 31st, file 7-P-37, captioned as follows:

"Brakeman L. L. Price—request for reinstate-

ment with all rights unimpaired and pay for time lost subsequent to July 13, 1949."

In conference held at Los Angeles, June 30, 1950, we were unable to agree upon a Joint Statement of Facts in this case, and I understand it will be submitted to the First Division, NRAB, by the employees ex parte.

Yours truly,

/s/ F. C. Paulsen.

EMPLOYEES' EXHIBIT "K"

National Mediation Board
Washington

Mediation Agreement—Union Pacific Railroad Company (South-Central District) (Carrier) and Brotherhood of Railroad Trainmen (Organization)

In settlement of differences as set forth in an application for mediation as described in Docket Case No. 3172, dated July 6, 1949, of the National Mediation Board and under the provisions of the Railway Labor Act, amended on June 24, 1934, it is mutually agreed that the question so submitted by the said Brotherhood of Railroad Trainmen to the said Union Pacific Railroad Company, South Central District, is hereby disposed of in the form of an agreement, a copy of which is attached hereto but not made a part hereof, as follows:

"Agreement dated July 15, 1949, providing for

establishment of away from home terminal for swing brakemen at Kelso, California, and related issues in connection therewith."

The above constitutes full and complete settlement of issues involved.

Signed at Salt Lake City, Utah, this 15th day of July, 1949.

For The Carrier:

/s/ By F. C. Paulsen,
General Manager.

For The Employees Represented by The Brotherhood of Railroad Trainmen:

/s/ By D. A. MacKenzie,
Asst. President.

[Seal]

Witness:

/s/ James L. Haloren,
Mediator, National Mediation
Board.

Swing Brakemen

It is agreed:

1. This agreement applies to brakemen in excess of two (hereafter referred to as swing brakemen) used on through freight trains between Las Vegas, Nevada and Kelso, California, in accordance with applicable provisions of State Laws.

2. Las Vegas, Nevada is established as the home terminal and Kelso, California the away from home terminal for swing brakemen covered by this agreement.

3. Swing brakemen working between Las Vegas, Nevada and Kelso, California, shall work and be paid in accordance with existing rules and regulations applicable to them, except as provided in Sections 4, 5 and 6, hereof.

4. (a) For application only to swing brakemen where Kelso is the away from home terminal, held away from home terminal time shall be paid in accordance with Article 14, Section (a) of the agreement effective April 1, 1943, as revised by the National Agreement dated at Chicago, November 14, 1947 and effective January 1, 1948, except that in the first 24-hour period, pay for held away from home terminal time shall start to accrue at the expiration of 12 instead of 16 hours and no allowance shall be paid for the 20th to 24th hours, inclusive. Article 14(a) shall otherwise apply.

(b) This variation in the application of the held away from home terminal time rules shall apply only to swing brakemen and shall not constitute a precedent in the application of the rules nor be cited by the employees hereafter as a basis for requesting the same consideration for any other employees.

5. Under this agreement, swing brakemen shall be used from the brakemen's extra board at Las Vegas, Nevada, working first-in first-out in conjunction with other brakemen on that extra board. This swing brakemen service shall be considered unassigned service and the daily guarantee pro-

vided for in Article 32(a) of the schedule agreement shall not apply.

6. Under this agreement, when no swing brakemen are available at Kelso, it shall be permissible to transfer a swing brakeman from a train moving in one direction to a train moving in an opposite direction at the meeting point of the two trains, or a station reasonably close, in which event swing brakemen shall be paid on a turnaround basis calculated from time of reporting for duty at the initial terminal station until released from duty at that station.

7. Nothing herein shall be construed as superseding any provision of existing agreement except as specifically provided herein.

8. This agreement shall be effective July 18th, 1949, and shall terminate thirty days after written notice served by either party upon the other.

Union Pacific Railroad Company,

/s/ By F. C. Paulsen,
General Manager.

Brotherhood of Railroad Trainmen,

/s/ By L. E. Foley,
General Chairman,

/s/ By D. A. MacKenzie,
Asst. President.

Salt Lake City, Utah, July 15, 1949.

National Railroad Adjustment Board
First Division

April 10, 1951

Docket No. 27393

Parties to dispute Brotherhood of Railroad Trainmen vs. Union Pacific Company (South-Central District)

EMPLOYEES' REBUTTAL TO CARRIER'S
SUBMISSION

Statement of Claim: Claim for restoration to service with all rights unimpaired and for pay for all time lost for Brakeman L. L. Price since July 13, 1949.

Employees' Rebuttal to Carrier's Submission: That portion of the carrier's statement of facts reading as follows:

"Prior to July 12, 1949 and subsequent thereto, the third brakeman required on freight trains under Nevada law was called from the brakemen's extra board. The brakeman accompanied the train westward from Las Vegas, Nevada to Nipton, California, left the train at the latter point and then accompanied an eastbound train from Nipton, California to Las Vegas, Nevada as directed by the train dispatcher."

while briefly explained on pages 20 and 21 of the carrier's submission, is somewhat misleading as the language "prior to July 12, 1949" indicates an indefinite prior period when the facts are that swing

brakemen had been required to detrain at Nipton, California, only subsequent to June 27, 1949, as will be noted on page 3 of the carrier's submission (see date of Superintendent's Circular No. 77). This action was vigorously protested by the employees as will be noted by the fact that the services of the National Mediation Board were requested on the basis of the carrier's disregard for section (b) of Article 32 reading as follows:

"Swing brakemen will not be tied up nor released at points where sleeping and eating accommodations are not available."

For some months prior to June 27, 1949, swing brakemen had been detrained at Kelso, California, where eating and sleeping accommodations were available. This method of handling swing brakemen was restored on July 15, 1950, with the conclusion of Mediation Agreement 3172 (Employees' Exhibit K).

The carrier's complaint that the employees did not assert that the claimant was not guilty of rule violations, as charged appears to be far reaching. Assuming that under the agreement the employee's guilt should be established by a fair hearing in accordance with the provisions of the agreement, no employee is guilty until such time as reasonable evidence sustaining the charges has been heard, and without such an investigation, it appears obvious that the guilt of the claimant in this case was not established and that such an assertion from the employees would have served only to reiterate an obvious, reasonable fact.

The carrier lays heavy stress upon the alleged charges that the claimant refused to protect his assignment and refused to obey instructions, asserting that the claimant was instructed to deadhead from Las Vegas to Nipton and to perform service as a swing brakeman on extra 1622 east from Nipton to Las Vegas. The employees contend that the claimant did precisely as instructed. He deadheaded to Nipton and returned to Las Vegas for food after receiving instructions that the train on which he was to swing from Nipton to Las Vegas would not arrive at Nipton until approximately 4:00 a.m. on the following morning. He was ready and willing to fulfill his assignment by returning to Nipton on a freight train known as symbol MLA. Such is again in support of the employees' contention established in the so-called transcript of investigation as indicated on pages 9 and 10 of Employees' Exhibit A in the following questions and answers:

"What conversation did you have with Brakeman Price?

A. First of all he said, this is Brakeman Price. He said, I came into Las Vegas to eat. Do you want me to go back out on this MLA to protect the UX connection at Nipton."

"Q. It was your understanding that he returned deadhead from Nipton on the MSF train, leaving there about 11:10 p.m. and arriving Las Vegas shortly after midnight?

A. Yes, sir.

"Q. You instructed him he definitely was not to return to Nipton?

A. That is right. I told him exactly, it would not be necessary."

"Q. You made it very plain to him?

A. Yes, sir."

"Q. Was he arbitrary with you on the phone?

A. No, sir."

It will be noted that the claimant registered in and tied up at Las Vegas only after he had been definitely instructed not to return to Nipton to perform services as swing brakeman on extra 1622 east. Consequently, the claimant did not refuse to do what he was told unless it could be construed that he did secure food when he was told not to; however, the record does not indicate definitely that he was instructed not to secure food. The record does indicate that he secured the food without in any way affecting the efficiency of his performance as instructed by the carrier.

The carrier insists that there were adequate eating and sleeping accommodations at Nipton, as indicated in their statement and on page 20 of their submission, reading as follows:

"There were, of course, adequate eating and sleeping accommodations at Nipton, * * * "

The employees contend there were no eating accommodations at Nipton whatsoever between the hours of 8:00 p.m. and 6:00 a.m., and the carrier's operating officers were well aware of this fact. In support of the employees' contention, we insert herein

a copy of a notice dated July 2, 1949, and signed before a Notary Public. This notice was furnished to the local officers of the Brotherhood of Railroad Trainmen representing the brakeman involved and reads as follows:

"July 2, 1949
Nipton, Calif.

"Brotherhood of Railroad Trianmen
Las Vegas, Nev.

"To Whom It May Concern:

"This is notice that there will be no meals served at Nipton Hotel between the hours of 8:00 p.m. and 6:00 a.m. daily unless agreement is reached providing a minimum of \$200.00 a month revenue from rooms and I will notify Brotherhood of Railroad Trainmen of such agreement."

(Original signed),
Mrs. J. N. Morrow.

[Seal] (Signed) Mozelle H. Purcell, Notary.

"My commission expires July 7, 1952."

"Witness"—(Signed) C. Purcell.

The carrier's exception to the employees' statement that it is questionable whether the services of Brakeman Price as swing brakeman were needed at all at Nipton on the date in question and that no other brakeman was sent from Las Vegas to protect the services originally intended for Brakeman Price, is also misleading. The carrier's assertion, "The reason Brakeman Price's services were not utilized for the services originally intended was be-

cause Brakeman Price refused to perform that service as instructed," is not supported by the evidence adduced in their own so-called investigation. The following statements support the contention of the employees:

"Q. Mr. Smith, on my instructions did you contact the Timekeeping Bureau at Los Angeles and have them ascertain from the records of the Company on file at that point who was the Swing Brakeman, shown by Conductor L. T. Robertson, on X 1600 W, symbol 4-MLA-8, departing Las Vegas 1:15 a.m., July 13th, 1949?

A. Yes, sir.

"Q. Who was the Swing Brakeman shown by Conductor Robertson?

A. Brakeman G. E. White.

"Q. And did you have them advise also who the Swing Brakeman was shown by Conductor W. E. Montgomery, on X 1622 E, from Nipton to Las Vegas, on that date?

A. Yes, sir. That was also Brakeman G. E. White."

It will be noted that Swing Brakeman White was used on extra 1600 west, symbol 4-MLA-8, departing from Las Vegas at 1:15 a.m., which was the one and same MLA on which the claimant was ready to return to Nipton, but he was instructed not to return on that train. Obviously the dispatcher knew that the claimant's services were not needed at Nipton as Brakeman White apparently arrived at Nipton well in advance of the time that it was

expected the claimant's services would be needed, as it is noted that Brakeman White was used on extra 1622 east from Nipton to Las Vegas, the train for which the claimant was originally deadheaded to Nipton's supposedly to protect from that point. This affirms the employees' statement that no other brakeman was sent from Las Vegas to protect the service intended for the claimant from Nipton. It apparently was not necessary to send an additional brakeman to Nipton in lieu of the claimant herein referred to. Consequently, the actions of the claimant, from an operational standpoint, were precisely what the operating officers of the railroad wanted. Had Brakeman Price not returned to Las Vegas for food, it would have been necessary for the carrier to have deadheaded some brakeman from Nipton to Las Vegas. The carrier's assertions in this event are indicative of their failure to comprehend the real situation involved in this particular instance, or they are not interested in presenting the real facts to your Honorable Board.

The carrier's indicated attempt to white-wash their method of conducting investigations without any consideration for the provisions of the agreement under which the claimant was working is evidenced by their assertion in that portion of the carrier's alleged to be unchallenged facts as noted in items 5 and 6 on page 10 of the carrier's submission, reading as follows:

“ * * * and instructed to appear for investigation and hearing at 10:00 a.m. July 17th, at the

office of the Assistant Superintendent at Las Vegas, Nevada.

"6. The Claimant appeared at the Assistant Superintendent's office as directed in the notice of charges, and after the investigation and hearing had started, he requested postponement for the purpose of obtaining a representative. Request for postponement was granted until 9:30 a.m. the following day, July 18th. On the following day, July 18th, the Claimant requested the investigation and hearing be indefinitely postponed."

and does not appear to be consistent with the evidence adduced at the carrier's so-called investigation over which they had full control without opposition. The statement of one, Mr. S. M. Smith, is disclosed on pages 8 and 9 of Employees' Exhibit A as follows:

"Q. Mr. Smith, did Mr. Price volunteer any information to you as to why he did not have his representative at 10:00 a.m., July 17th, for the investigation, as it has been stated by Chief Crew Dispatcher Dixon his representative was in town?

A. He stated the reason he wanted the investigation postponed until July 18th was because his witness, Brakeman L. L. Cook, was called for 10:00 a.m., July 17th, and he didn't want to have to pay him for laying off to attend the investigation as his witness."

The carrier would imply that the request for the

first postponement was for the purpose of securing a representative of the claimant's choice who was available on the date originally set for the investigation, when the facts are that the first postponement was definitely requested because of the fact that important witnesses, whom the claimant considered necessary to establish the facts regarding the charges against him, were not available on this particular day. The carrier's position that witnesses produced by the claimant would be at his expense most assuredly had some effect upon the claimant's endeavoring to have such witnesses present without being required to pay for the time they might lose. The carrier's assertion that the second postponement was requested for an indefinite period appears to be erroneous as the second postponement was requested until such time as the representative of the claimant's choice could be present, wherein the claimant named the Local Chairman of the Brotherhood of Railroad Trainman as his choice of representative. The carrier was well aware of the whereabouts of the Local Chairman and about when he would return and be available.

The carrier, in their attempts to justify their actions in this case, depends heavily upon the evidence adduced at their so-called investigation at which the employee or his representative had no opportunity to cross-examine witnesses or to introduce their own witnesses and it appears only reasonable that your Board should have the benefit of the written statement of the claimant in his request for the

services of his local lodge in handling his grievance,
a copy of which follows:

"Las Vegas, Nevada
July 27, 1949

"Mr. Claude Thompson, Mr. E. C. Grounds,
Death Valley Lodge No. 781, Las Vegas, Nevada.

"Gentlemen:

"Please accept this as a statement of facts pertaining to my discharge from the services of the Union Pacific Railroad and a request for Lodge action for my reinstatement with pay for all time lost and all seniority and all rights restored.

"Brakeman L. L. Price was called July 12, 1949, to deadhead on Train No. 37, Las Vegas, Nevada, to Nipton, California, as a swing brakeman.

"No. 37 departed from Las Vegas at 9:15 p.m., July 12th, arriving in Nipton, California at 10:30 p.m., July 12th.

"Brakeman Price, on arrival at Nipton, California, called the C.T.C. Dispatcher on the C.T.C. telephone as per instructions.

"The Dispatcher advised Brakeman Price that Extra 1622 East, the train he was to swing back to Las Vegas, Nevada, would not arrive at Nipton, California, until 4:30 a.m. or 5:00 a.m. July 13th, 1949.

"Brakeman Price advised the Dispatcher that there were no eating facilities open at Nipton, California, between the hours of 8:00 p.m. and 6:00 a.m., and that he would return to Las Vegas, Nevada, on

the first Las Vegas bound train, to obtain food.

"Brakeman L. L. Cook was head brakeman on Extra 1623 East, which train was then in the hole at Bryant for No. 37 and Brakeman Cook was endeavoring to communicate with the C.T.C. Dispatcher and heard the conversation between the C.T.C. Dispatcher and Brakeman Price and can verify the facts of this statement.

"Brakeman Murphy was called as swing man, Nipton, California to Las Vegas, Nevada, and was present at Nipton, California. He heard all statements made by Brakeman Price and can verify that Brakeman Price endeavored to buy food at the hotel in Nipton and was told by the management of the hotel that no food was available between the hours of 8:00 p.m. and 6:00 a.m. and that the management of the Nipton Hotel had notified the Union Pacific Railroad in writing, that no food was available for Union Pacific Railroad Brakeman between the hours of 8:00 p.m. and 6:00 a.m.

"Brakeman L. L. Price deadheaded from Nipton, California to Las Vegas, Nevada on Extra 1623 East arriving at Las Vegas at 12:35 a.m., July 13th.

"Brakeman Price obtained food and then advised the Chief C.T.C. Dispatcher by telephone at the Union Pacific Railroad Yard Office that he had obtained food and was ready and willing to return to Nipton, California, on the M.L.A. called to leave Las Vegas at 1:45 a.m., July 13th.

"The Chief Dispatcher advised Brakeman Price that he need not return to Nipton, California.

"Brakemen G. E. White, L. L. Cook, F. M. Murphy, R. P. Johnson and several others were present and can verify that Brakeman Price called the Chief Dispatcher and advised him of being ready and willing to return to Nipton on the M.L.A.

"After being told that he need not return to Nipton, Brakeman Price registered in and went home.

"Brakeman G. E. White, swing Brakeman on the M.L.A. arrived at Nipton at 4:00 a.m., July 13, and Extra 1622 East, the train Brakeman Price would have been used on had he been instructed by the Chief Dispatcher to return to Nipton, arrived at Nipton at 6:40 a.m. July 13th.

"Brakeman Price was held out of service on instruction of Assistant Superintendent W. B. Groome at 9:05 a.m. July 13th.

"Brakeman Price was notified at 7:00 p.m., July 16, to be present at hearing to be held at 10:00 a.m. July 17th.

"Brakeman Price was present at said hearing and requested and was granted a postponement until 9:30 a.m., July 18th, due to the fact that witnesses G. E. White and L. L. Cook were out of town on the Moapa Local.

"Brakeman Price was present at the office of Assistant Superintendent Groome at 9:30 a.m. July 18th, and requested postponement of the hearing until his representative, Mr. E. C. Grounds, was in Las Vegas.

"Assistant Superintendent Groome advised Brakeman Price that he could not grant further postponement of the hearing.

"Brake man Price requested Mr. Groome's Chief Clerk, Stan Smith, to type a written request of postponement and Stan Smith did so.

"Brakeman Price signed said request and handed it, in person, to Mr. Groome.

"Mr. Groome advised Brakeman Price verbally that unless Brakeman Price was advised otherwise, the hearing would be held at 2:30 p.m. July 18th.

"Brakeman Price received a letter from Superintendent Wengert on July 27th, 1949, advising him that he was discharged from the Company's service.

"Copies of said letter and others are attached hereto.

"Action on this matter is respectfully requested due to violation of Art. 33A of our current schedule, effective April 1, 1943.

"Respectfully yours,"

(Signed) L. L. Price

The employees further contend that the carrier disregarded the agreement under which they work and its application in regard to the controversy herein involved when they dismissed the claimant from their service. In support of this contention, the employees offer the following indicated actions on the part of the carrier:

1. The carrier's attempt to establish a terminal in the middle of an established district without negotiations.

2. The carrier's attempt to detrain brakemen at a station en route without satisfactory eating and

sleeping facilities without regard to the provisions of the agreement.

3. The carrier's method of conducting the investigation.

4. The carrier's removal of the claimant from service in violation of the agreement under which he was employed.

To defend or support the carrier's position in this case would make it appear justifiable for a carrier to arbitrarily, without negotiation, change the working conditions of its employees in a manner that would subject them, without recourse, to exposure at a station en route in desert terrain infested with scorpions, rattlesnakes, and other insects of the desert, without even affording them an opportunity to obtain ice water, and, in the event employees object or endeavor to secure release from these conditions upon their own initiative, to remove them from service without any regard for the provisions of their agreement and, as in this particular case, without conducting a thorough investigation. The employees contend that such actions, as herein related, on the part of the carrier are indicative of retaliatory measures taken, on account of the employees seeking relief through the request of their organization for the services of the National Mediation Board, in discharging this claimant from the services of the company without any recourse.

The employees urgently request that your Board

give consideration to their contentions and sustain their position with an affirmative award.

Brotherhood of Railroad Trainmen, Union Pacific
Railroad Company (South-Central District).

/s/ By L. E. FOLEY,
General Chairman.

Award 15509
Docket 27393

NATIONAL RAILROAD ADJUSTMENT BOARD

First Division

39 South La Salle Street, Chicago 3, Illinois
With Referee A. Langley Coffey

Parties to Dispute:

Brotherhood of Railroad Trainmen Union Pacific
Railroad Company (South Central District).

Statement of Claim: "Claim for restoration with all rights unimpaired and for pay for all time lost for Brakeman L. L. Price since July 13, 1949."

Findings: The First Division of the National Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

If the carrier is to have efficient operations on its railroad, employes must be relied on to obey operating instructions and orders. Claimant was found to have wilfully disobeyed his orders. This was insubordination and merited discipline.

The employe has been tendered reinstatement on a leniency basis but seeks complete vindication on the grounds that he was denied the investigation provided by the rules of agreement. Thus, the only question for review is whether there was substantial compliance with the investigation rule.

Basically, the complaint is that the hearing was held when the claimant was not present.

The transcript of the hearing shows that at the appointed time and place the employe appeared without a representative. On the carrier being acquainted with the employe's desire to have his representative present and for no other reason assigned by the employe at the time, the hearing was postponed until the following morning by mutual consent. Neither the employe nor his representative appeared the next morning but the employe made written request for additional time "until my representative Mr. E. C. Grounds is in Las Vegas". The hearing was passed to the afternoon of the same day and claimant was notified to appear and be ready to proceed at that time. When he failed to appear the hearing was held in his absence.

The transcript shows that on the date when the hearing was originally set the employe's chosen

representative was off duty and as far as we know was in Las Vegas. No reason is assigned for his failure to appear, but his presence would have obviated the need of any postponement for the reason assigned. The employe, in connection with his request for further delay, told an officer of the carrier he did not want to proceed with the hearing on the first day because he would have been compelled to pay a material witness for time lost in order to have him present; that since the witness was scheduled to be off the next day he sought to avoid this expense by asking for the first postponement. We are left to speculate what would have happened if on the day following the hearing the witness was again on duty but the chosen representative was in from his assigned run.

It must be understood that there is no greater sanctity in the investigation rule than any other on the property. All rules are for the aid, guidance, and protection of responsible persons. The right of the employe to be heard before being disciplined is a personal right which he can waive by action, inaction, or failure to act in good faith. He cannot play fast and loose with the rule and expect its strict observance by others who too are accountable for failure to act promptly, justly, and in good faith.

It would have been more to the employe's credit if he had been forthright in the reason assigned for wanting the hearing delayed the first time. Also, his position here would have been strengthened had he personally appeared at all stages of the proceeding

to labor as best he could to preserve his record and to get his story to us first hand. All that the transcript reflects does claimant no credit, but leaves us with the feeling that the things of which he now complains were planned by him that way.

Award: Claim denied.

**National Railroad Adjustment Board. By Order of
First Division.**

Attest:

/s/ (Signed) **J. M. MacLeod,**
Executive Secretary.

**Dated at Chicago, Illinois, this 25th day of June,
1952.**

[Endorsed]: Filed July 12, 1955.

[Title of District Court and Cause.]

AFFIDAVIT

**State of Nebraska,
County of Douglas—ss.**

A. J. VanDercreek, being first duly sworn, deposes and says:

My name is A. J. VanDercreek and I am an Assistant Vice president in the Department of Labor Relations of the Union Pacific Railroad Company with offices at Omaha, Nebraska. In such capacity I am an assistant to Mr. E. J. Connors who is Vice President, Department of Labor Relations. I have personal knowledge of the facts set forth in this affidavit.

Under date of January 15, 1951, by letter bearing the date and addressed to Vice President E. J. Connors by regular U. S. Mail and received in the office of the Department of Labor Relations of the Union Pacific Railroad Company at Omaha, Nebraska, the latter was advised by Mr. T. S. McFarland, then Executive Secretary of the First Division of the National Railroad Adjustment Board, that Mr. L. E. Foley, General Chairman, Brotherhood of Railroad Trainmen, South-Central District of the Union Pacific Railroad Company, had submitted a dispute concerning the discharge of Brakeman L. L. Price to the National Railroad Adjustment Board. A true and correct copy of that letter is as follows:

“National Railroad Adjustment Board
First Division

39 South La Salle Street, Chicago 3, Illinois
January 15, 1951

“Mr. E. J. Connors, Vice President
Union Pacific Railroad Company—South
Central District
1416 Dodge Street
Omaha, Nebraska

Dear Sir:

U:1040

“We have received from General Chairman L. E. Foley; one ex parte submission in claim for restoration to service of Brakeman L. L. Price as shown in his letter of the 11th instant.

It is our understanding that you were given a copy of the submission by Mr. Foley. Pursuant to

Union Pacific Railroad

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the provisions of Circular B of October 14, 1949, you are requested to file by February 14, 1951, fifteen copies of your answer to the employee's submission and to give the General Chairman a copy.

Yours very truly,

/s/ T. S. McFarland,
T. S. McFarland,
Executive Secretary.

TSM/pk

Mr. W. P. Kennedy, Pres. BRT
cc: Mr. L. E. Foley, GC-BRT
1129 Bartlett Bldg.
215 West Seventh Street
Los Angeles 14, Calif."

Under date of April 13, 1951, by letter bearing that date and addressed to Vice President E. J. Connors by regular U. S. Mail and received in the office of the Department of Labor Relations of the Union Pacific Railroad Company at Omaha, Nebraska, the latter was advised by Mr. T. S. McFarland, then Executive Secretary of the First Division of the National Railroad Adjustment Board, that the file of the First Division, National Railroad Adjustment Board, in the dispute concerning the discharge of Brakeman L. L. Price, had been completed, that the parties to that dispute had waived oral hearing and that First Division Docket number "27393" had been assigned to that dispute. A true and correct copy of that letter is as follows:

**"National Railroad Adjustment Board
First Division**

**39 South La Salle Street, Chicago 3, Illinois
Telephone: Andover 3-1050**

April 13, 1951

U-1040

**"Mr. E. J. Connors, Vice President
Union Pacific Railroad Company
1416 Dodge Street
Omaha 2, Nebraska**

**Mr. W. P. Kennedy, President
Brotherhood of Railroad Trainmen
Standard Building
Cleveland 13, Ohio**

Gentlemen:

"Our docket number has been assigned, as indicated, to the following Union Pacific Railroad Company and Brotherhood of Railroad Trainmen's case, which was submitted ex parte and which has been completed:

"27393—Claim for restoration to service with all rights unimpaired * * * July 13, 1949.

"The parties waived oral hearing.

Yours very truly,

/s/ T. S. McFarland,

T. S. McFarland,

Executive Secretary.

TSM/em

cc: Mr. L. E. Foley, General Chairman, BRT"

Under date of December 5, 1952, there was received in the office of the Department of Labor Re-

lations of the Union Pacific Railroad Company at Omaha, Nebraska, through regular U. S. Mail, a letter purporting to be signed by "L. E. Price, Brakeman, Las Vegas, Nevada" and addressed to Vice President E. J. Connors. A true and correct copy of that letter is as follows:

"1400 Lewis Ave.
Las Vegas, Nevada
5 December 1952

"Mr. E. J. Connors
Union Pacific Railroad
Omaha, Nebraska.

R.E.: F. C. Paulsen File No. 011.221
Railroad Adjustment Board
Award 15509 Docket 27393

Dear Sir:

"I appeal to you at this time for your consideration of my claim for reinstatement with full pay for time lost subsequent to July 13, 1949 with all rights unimpaired.

"Investigation of the facts in the records of my case would reveal that there is merit in my request after my claim has been heard and denied by the Railroad Adjustment Board.

"May I present these facts, substantiated by records available to you, for your consideration?

"1) Nipton, Calif. was not suitable for a swing brakeman to be tied up or held away from home terminal between the hours of 8 P.M. and 6 A.M. on July 12, 1949.

"2) I notified the C.T.C. Dispatcher, from Nipton, that I was returning to Las Vegas, Nevada to obtain food.

"3) I offered to return to Nipton on the M.L.A. to protect my assignment on Extra 1622 East.

"4) Brakeman G. E. White, swingbrakeman on the M.L.A., called to leave Las Vegas at 1:45 A.M. July 13, worked back to Las Vegas as swing brakeman on Extra 1622 East, the train I had been deadheaded to Nipton, on No. 37, to protect.

"5) No. 37 arrived at Nipton, Calif. July 12, 1949 at 10:30 PM Extra 1622 East departed Nipton, Calif. July 13, 1949 at 6:40 AM.

"6) I was advised, by C.T.C. Dispatcher:

a) At Nipton;

'he had advised Mr. Groom that the swing brakeman would be at Nipton for about 8 hours without a place to eat if he were deadheaded on No. 37'

b) At Las Vegas;

'swing brakeman G. E. White would reach Nipton on the M.L.A. in plenty of time to protect Extra 1622 East at Nipton and that it was not necessary for me to return to Nipton'

"7) I was present at the designated time and place for the investigation when called and consented to a postponement to the following morning because my two witnesses were out of town on the Moapa Local.

"8) E. C. Grounds, at that time Local Chairman of the B. of R. T. was a sufficient number of 'times out' on the brakemans Extraboard that, in his opinion, 'he would be present as my representative the next morning.' He advised me that if he were not for me to 'request a postponement in writing until I am back in Las Vegas and ask White and Cook to layoff if they have to in order to be present at the investigation.'

"9) Grounds was in Milford, Utah in service of the Union Pacific Railroad as a brakeman, the following morning, July 18, 1949 I requested the postponement as per his instructions and my two witnesses White and Cook offered to layoff without pay until the investigation could be held as we were all concerned regarding the Nipton situation.

"10) The postponement, as I had requested, was refused and the investigation was held at 2:30 PM July 18, 1949 without me or anyone designated by me, being present.

"11) I was discharged as a result of that investigation.

"I ask your consideration of my claim at this time for two reasons:

"1) I was seriously injured in July 1944 in Union Pacific Railroad service and lost a year and ten days work at the peak of our earnings yet I settled my claim myself with our company for \$4500.00 which was less than I would have earned had I been able to work and a great deal less than

I would have received had I resorted to legal means to settle my claim.

"2) I am now prepared and am filing suit in Federal Court Jan. 5, 1953 unless I am reinstated with full pay for time lost prior to that date.

"With respect and appreciation for your consideration of this matter.

/s/ L. L. Price,
Brakeman,
Las Vegas, Nevada."

On December 12, 1952, I addressed a letter to Mr. L. L. Price responding to his letter of December 5, 1952, addressed to Vice President Connors and quoted above. I signed Mr. Connors' name to that letter, being duly authorized so to do. A true and correct copy of the letter to Mr. Price, dated December 12, 1952, is as follows:

"Union Pacific Railroad Company
Omaha 2, Nebraska

E. J. Connors,
Vice President

December 12, 1952

011-221-P

"Mr. L. L. Price
1400 Lewis Avenue
Las Vegas, Nevada
Dear Sir:

"Your letter December 5th, appealing for consideration, your claim for reinstatement with full

pay for time lost subsequent to July 13, 1949, with all rights unimpaired.

"Your claim was submitted to the First Division of the National Railroad Adjustment Board under the provisions of the Railway Labor Act and denied by the Board in Award No. 15509.

"Mr. A. D. Hanson, General Manager, Salt Lake City, is the highest officer of appeal in discipline cases on the South-Central District, on which you were formerly employed.

Yours very truly,

/s/ E. J. Connors.

cc—Mr. A. D. Hanson

General Manager

Union Pacific Railroad Company

Salt Lake City, Utah"

The now deceased L. E. Foley was General Chairman of the Brotherhood of Railroad Trainmen on the South-Central District of the Union Pacific Railroad Company from February 24, 1947, to December 28, 1952, and in such capacity represented and handled grievances and other disputes under the provisions of the Railway Labor Act for employees of Union Pacific Railroad Company (South-Central District), including those employed as brakemen. Such handling included the prosecution of said grievances to the First Division of the National Railroad Adjustment Board. I have checked the records in my office and during the time Mr. L. E. Foley was General Chairman of the Brotherhood of Railroad Trainmen, he progressed approx-

imately 14 disputes or grievances to the First Division of the National Railroad Adjustment Board. Of this number, 3 were progressed to and handled before the said First Division prior to February, 1951.

/s/ A. J. VanDercreek.

State of Nebraska,

County of Douglas—ss.

Subscribed and sworn to before me, a Notary Public, this 8th day of May, 1956.

[Seal] /s/ Louis Scholnick.

My Commission expires May 10, 1960.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 10, 1956.

[Title of District Court and Cause.]

ANSWER

First Defense

I.

Defendant admits all of the allegations in Paragraphs I, II, and III of Plaintiff's Complaint.

II.

Answering Paragraph IV of the Complaint, Defendant admits all of the allegations therein, except Defendant expressly denies that Plaintiff duly performed all terms and conditions of the said agreements required on his part to be performed.

III.

Defendant denies each and every allegation and averment in Paragraphs V, VI, and VII of Plaintiff's Complaint.

Second Defense

For a further and second answer and separate defense to the Complaint, Defendant alleges as follows:

I.

Plaintiff, as a member of the Brotherhood of Railroad Trainmen, and acting under the provisions of the Railway Labor Act (45 U.S.C.A. Sec. 151 et seq.), and the terms and conditions of the collective bargaining agreement alleged in the Complaint, on or about the 27th day of July, 1949, requested Death Valley Lodge No. 781, Brotherhood of Railroad Trainmen, to take action for his reinstatement as an employee of the Defendant. Defendant further alleges that at the time of the discharge of the Plaintiff and the said written request by the Plaintiff for action in his behalf by the Brotherhood of Railroad Trainmen, and at all times mentioned in the Complaint, the Constitution, By-Laws and Rules of the said Brotherhood of Railroad Trainmen contained a provision relating to grievances, and authorization of the said Brotherhood by members, reading as follows:

"Except in individual cases where the member or members involved serve seasonable written notice on the Brotherhood to the contrary, each member of the Brotherhood of Railroad Trainmen grants full and complete authority to the said Brother-

hood and any and all of its duly constituted representatives to act for him and in his name for the purpose of collecting, settling, compromising, amending, dismissing, or in any other manner disposing of any and all of his claims, complaints or grievances against his railroad and motor carrier employers, and authorizes the Brotherhood and its representatives to submit such claims, complaints or grievances for determination to any person, board or other tribunal provided by law or otherwise which to the Brotherhood or its representatives may be deemed necessary or advisable, and the Brotherhood and its representatives shall have full and complete authority to receive notice of hearings, if any, or to waive hearing, and to appear for, represent and act for its members before such person, board or other tribunal in connection with the consideration and determination of such claims, complaints or grievances; provided, that any adverse action by the Brotherhood or its representatives on any such claim, complaint or grievance shall be subject to the appropriate right of appeal under the terms and limitations of this constitution."

II.

Defendant further alleges that the said Brotherhood of Railroad Trainmen, acting pursuant to the written request of the Plaintiff, and pursuant to its Constitution, By-Laws and Rules, including the aforesaid authorization by the Plaintiff as a member of said Brotherhood, submitted the claim of the Plaintiff for restoration to service with all rights

unimpaired and for pay for all time lost, by letter to the Defendant dated October 29, 1949; that thereafter, Mr. L. E. Foley, General Chairman of the Brotherhood of Railroad Trainmen, with the knowledge and approval of the Plaintiff, requested the Defendant to join with the said Brotherhood in a submission of said claim to the National Railroad Adjustment Board pursuant to the provisions of the Railway Labor Act; that the said Brotherhood and the Defendant were unable to agree upon a statement of facts, and that the said claim was thereafter filed and docketed with the National Railroad Adjustment Board on the 11th day of January, 1951, with the knowledge and approval of the Plaintiff, acting by and through the Brotherhood of Railroad Trainmen. The Defendant filed and docketed its response to the Plaintiff's submission, and the Plaintiff subsequently filed and docketed with the National Railroad Adjustment Board his rebuttal to the Defendant's submission. Oral hearing was waived in the submission by the Plaintiff and was agreed to in the submission by the Defendant. Thereafter, the National Railroad Adjustment Board, First Division, on the 25th day of June, 1952, filed and docketed its findings and award, expressly denying the claim of the Plaintiff for restoration to service with all rights unimpaired and for pay for all time lost.

III.

Defendant alleges that the aforesaid award of the National Railroad Adjustment Board is final and

binding upon the Plaintiff and the Defendant in this action and constitutes a final and complete determination of all matters complained of by the Plaintiff in this action, and that the election of the Plaintiff to pursue the remedy provided by the Railway Labor Act and the said collective bargaining agreement constitutes a bar to the maintenance of the above entitled action by the Plaintiff.

Wherefore, Defendant prays judgment for Defendant and against the Plaintiff, for costs of suit herein, and for all proper relief.

E. E. BENNETT,
EDWARD C. RENWICK,
MALCOLM DAVIS,
CALVIN M. CORY,

/s/ By CALVIN M. CORY,
Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed June 13, 1956.

[Title of District Court and Cause.]

REQUEST FOR ADMISSION

To: L. L. Price and his attorneys, Ralli, Rudiak & Horsey.

Defendant, Union Pacific Railroad Company, requests Plaintiff within ten days after service of this request, to make the following admission for the purpose of this action only, and subject to all perti-

nent objections to admissibility which may be interposed at the trial:

1. That at all times mentioned in the Complaint and pertinent to this action, the Constitution, By-Laws and Rules of the Brotherhood of Railroad Trainmen contained a provision relating to grievances and authorization of the said Brotherhood by its members reading as follows:

"Except in individual cases where the member or members involved serve seasonable written notice on the Brotherhood to the contrary, each member of the Brotherhood of Railroad Trainmen grants full and complete authority to the said Brotherhood and any and all of its duly constituted representatives to act for him and in his name for the purpose of collecting, settling, compromising, amending, dismissing, or in any other manner disposing of any and all of his claims, complaints or grievances against his railroad and motor carrier employers, and authorizes the Brotherhood and its representatives to submit such claims, complaints or grievances for determination to any person, board or other tribunal provided by law or otherwise which to the Brotherhood or its representatives may be deemed necessary or advisable, and the Brotherhood and its representatives shall have full and complete authority to receive notice of hearings, if any, or to waive hearing, and to appear for, represent and act for its members before such person, board or other tribunal in connection with the consideration and determination of such claims, com-

plaints or grievances; provided, that any adverse action by the Brotherhood or its representatives on any such claim, complaint or grievance shall be subject to the appropriate right of appeal under the terms and limitations of this constitution."

E. E. BENNETT,
EDWARD C. RENWICK,
MALCOLM DAVIS,
CALVIN M. CORY,

/s/ By CALVIN M. CORY,
Attorneys for Defendant.

Receipt of Copy Acknowledged.

[Endorsed]: Filed July 6, 1956.

[Title of District Court and Cause.]

DEPOSITION OF D. R. ALTIER

a witness herein, taken on behalf of defendant, at 2:00 p.m., Friday, July 20, 1956, at 215 West 7th Street, Los Angeles, California, before Edward A. Oreb, a Notary Public within and for the County of Los Angeles and State of California, pursuant to the annexed notice and stipulation.

Appearances of Counsel: For Plaintiff: Ralli, Rudiak & Horsey (no appearance). For Defendant: E. E. Bennett, Esq., Edward C. Renwick, Esq., Malcolm Davis, Esq., Calvin M. Cory, Esq., by Calvin M. Cory, Esq.

Reported by Edward A. Oreb, CSR.

(Deposition of D. R. Altier.)

Mr. Cory: This is the time fixed to take the deposition of Mr. Altier pursuant to stipulation entered into between the plaintiff and the defendant and a notice duly served upon the plaintiff of the taking of the deposition. Let the record show that Mr. Altier has been served with a subpoena and is testifying pursuant to a subpoena duces tecum.

D. R. ALTIER

a witness herein, having been first duly sworn, deposed and testified as follows:

Direct Examination

Q. (By Mr. Cory): Will you please state your name.

A. Daniel R. Altier.

Q. Where do you reside, Mr. Altier?

A. 4059 Garden Avenue, Los Angeles 39.

Q. Are you the general chairman of the Brotherhood of Railroad Trainmen for this division?

A. I am for this district.

Q. For this district?

A. South central district.

Q. Will you please state for the record your official capacity?

A. General chairman, Brotherhood of Railroad Trainmen, Southwest District.

Q. Would that be Pacific?

A. Union Pacific Railroad.

Q. How long have you been general chairman, approximately?

A. Since December the 29th, 1952.

(Deposition of D. R. Altier.)

Q. Prior to that time did you hold a position with the Brotherhood of Railroad Trainmen?

A. I was local chairman representing yardmen in the Los Angeles terminal and also secretary of this full general—of the general committee.

Q. Do you have with you the file of the Brotherhood of railroad Trainmen with reference to the dismissal of Mr. L. L. Price by the Union Pacific Railroad Company?

A. I have the file, the necessary papers in answer to the subpoena served me.

Q. Has that file been in your possession since you assumed the office of general chairman?

A. Yes.

Q. Prior to that time, was that file in the possession of your predecessor Mr. Foley?

A. Yes, sir.

Q. And at all times has been in the possession of the Brotherhood of Railroad Trainmen?

A. Yes, sir.

Q. Now, referring to the file, will you please describe how this matter originated insofar as the Brotherhood of Railroad Trainmen are concerned? Let me rephrase the question.

Will you please state the date and nature of the first communication in your file?

A. Will you please read that question back to me first.

(The question was read by the reporter.)

Q. (By Mr. Cory): That would be this letter from Mr. Price to which is attached the date and

(Deposition of D. R. Altier.)

nature of the first communication in your file signed by Mr. L. L. Price.

A. Under date of July 27th, 1949, Las Vegas, Nevada, addressed to Mr. Claude Thompson and Mr. E. C. Grounds, Death Valley Lodge number 761, Las Vegas, Nevada.

The nature of the correspondence indicates that Mr. Price was advising the secretary of his lodge and his local representative the circumstances that resulted in his being discharged from the services of the Union Pacific Railroad Company.

Q. Does the letter to which you have just referred appear in the employes rebuttal submission on file with the Railroad Adjustment Board?

A. Yes, sir.

Q. Is there a letter in your file, Mr. Altier, from Mr. Thompson to your predecessor Mr. Foley?

A. There is a letter dated Las Vegas, Nevada, February 27, 1950, addressed to Mr. L. E. Foley.

Q. Will you read it?

A. "General chairman No. BRT, 215 West 7th Street, Los Angeles.

"Dear Sir and Brother:

The attached case of Brother L. L. Price for reinstatement with pay for time lost and all rights unimpaired was handled by local chairman E. C. Grounds and no satisfactory agreement reached with the superintendent. At a regular meeting of Death Valley Lodge number 781 held on February 26, 1950, the case was approved for further handling by the general chairman.

(Deposition of D. R. Altier.)

"Fraternally yours, C. W. Thompson, SNT, Secretary and treasurer, Lodge number 781."

Q. Now, thereafter did Mr. Foley direct a letter to Mr. Price and if so what was the date of that letter?

A. The file indicates that on May 31, 1950, addressed to Mr. L. L. Price, 2400 Lewis Avenue, Las Vegas, Nevada, re brakeman, L. L. Price request for reinstatement with all rights unimpaired and pay for time lost subsequent to July 13, 1949.

"Dear Sir and Brother:

The above captioned case having been referred to this office by action of Lodge 781 on February 27th, 1950, has been handled in accordance with the by-laws of this organization up to and including a conference with the general manager in Salt Lake City on May 22, 1950, with no satisfactory adjustment agreed upon.

"I am attaching hereto a copy of my letter addressed to the general manager requesting that he join me in a submission of this case to the first division of the National Railroad Adjustment Board. At this time I desire to point out to you that the general manager in his conference on May 22nd, agreed to your reinstatement on a leniency basis. This proffer in my opinion was inconsistent with consideration given to you in the past and consequently was not accepted by the undersigned. However, I want it understood that you have the privilege of ordering this committee to settle your case as you see fit. Notwithstanding this, unless I hear

(Deposition of D. R. Altier.)

from you to the contrary, I shall proceed to make presentation of this case to the first division of the National Railroad Adjustment Board. As previously related to you we can always withdraw the case from the board in a settlement, agreed to by both the carrier and the organization. It is my opinion that to best protect your interests, this case should be prepared for the first division of National Railroad Adjustment Board.

Fraternally yours, L. E. Foley, General Chairman BRT."

Q. Mr. Altier, will you please also read into the record the contents of the letter referred to by Mr. Foley? . A. Dated May 31, 1950.

"Mr. F. C. Paulson, General Manager, Union Pacific Railroad Company, 10 South Main Street, Salt Lake City, Utah.

"Re brakeman L. L. Price request for reinstatement with all rights unimpaired, and pay for time lost subsequent to July 13, 1949.

"Dear Sir:

Your letter of May 22nd, 1950, your file 011. 1221, setting forth your position relative to the above captioned case after our discussion while in conference in Salt Lake City on May 22nd is not acceptable. The Committee's contention as set forth in our letter of March 27, 1950, that brakeman Price was removed from service without a proper and thorough investigation provided for in Article 33 of the Agreement effective April 1, 1943, has not changed.

(Deposition of D. R. Altier.)

"You are therefore hereby requested to join us in a submission of this case to the First Division of the National Railroad Adjustment Board and to fix a date, time and place for our meeting in an effort to agree upon a joint statement of facts in connection therewith.

"Very truly yours, L. E. Foley, General Chairman—BRT."

Q. Now, what is the next communication in your file thereafter from Mr. Foley to Mr. Price if any?

A. Under date of January 12, 1951, addressed to Mr. L. L. Price, 1400 Lewis Avenue, Las Vegas, Nevada.

"Re brakeman, L. L. Price request for reinstatement [7] with all rights unimpaired and pay for time lost subsequent to July 13, 1949.

"Dear Sir and Brother:

"The above captioned case having been prepared by this office for ex parte submission to the first division of the National Railroad Adjustment Board has been referred to the Brotherhood's statistical department, which department has approved such submission. The necessary copies of the submission have today been furnished to the secretary of the first division of the National Railroad Adjustment Board. Representatives of the carrier have 30 days in which to prepare their ex parte submission upon receipt of which this office will furnish the secretary of your lodge and the local chairman with a copy of both parts of the ex parte submission. You will be advised accordingly.

(Deposition of D. R. Altier.)

"Fraternally yours, L. E. Foley, General Chairman—BRT."

Q. What is the next communication if any from Mr. Foley to Mr. Price?

A. Dated February 13, 1951, addressed to Mr. L. L. Price, 1400 Lewis Avenue, Las Vegas, Nevada.

"Re brakeman, L. L. Price request for reinstatement with all rights unimpaired and pay for time lost subsequent to July 13, 1949.

"Dear Sir and Brother:

"Enclosed herewith is a copy of the carrier's plea for a 30 day extension of time for the preparation of [8] their rebuttal to our submission of your case which letter is self-explanatory. I shall keep you fully advised of all future developments.

"Fraternally yours, L. E. Foley, General Chairman, BRT."

Q. Will you please read into the record the copy of the letter referred to by Mr. Foley?

A. "Dated February 6, '51," addressed to Mr. T. S. McFarland, Executive Secretary, First Division National Railroad Adjustment Board, 39 South La Salle Street, Chicago, Illinois.

"Dear Sir:

"Referring to your letter dated January 15, 1951, your file U-1040 concerning ex parte submission received by you from general chairman L. E. Foley of the Brotherhood of Railroad Trainmen on behalf of brakeman L. L. Price and advising that carrier's answer would be due by February 14, 1951,

(Deposition of D. R. Altier.)

it is necessary that carrier request an extension of time from February 14 to March 16 in which to file answer to the employee's ex parte submission in this dispute.

"Messrs. Kennedy and Foley are being advised of carrier's request by copy of this letter.

"Very truly yours," stamped "Original signed by E. J. Connors."

Q. What is the next communication if any from Mr. Foley to Mr. Price? [9]

A. It is dated April 14, 1951, addressed to L. L. Price, 1400 Lewis Avenue, Las Vegas, Nevada.

"Re brakeman L. L. Price request for reinstatement with all rights unimpaired and pay for time lost subsequent to July 13, 1949.

"Dear Sir:

"Further in connection with my letter of January 12, 1951, with reference to the above captioned case this will serve to advise that the submission of this case has been completed. It has passed all statistical boards. Has been accepted by Division 2 of the National Railroad Adjustment Board and has been assigned docket number 27393. It will be heard in its proper turn before said board. All concerned will promptly be advised of the decision of the board on this case.

"Very truly yours, L. E. Foley, General Chairman, BRT."

Q. What is the next communication if any from Mr. Foley to Mr. Price?

(Deposition of D. R. Altier.)

A. "July 1, 1952, Mr. L. L. Price, 1400 Lewis Avenue, Las Vegas, Nevada.

"Re brakeman, L. L. Price request for reinstatement with all rights unimpaired and pay for time lost subsequent to July 13, 1949.

"Dear Sir and Brother:

"I am attaching hereto a copy of award number 15509 in disposition of docket number 27393 which represents your case as presented to the First Division of the [10] National Railroad Adjustment Board by this committee.

"It is with the deepest regret that I note this award denies your case in its entirety. I was of the opinion that your case was the best we had before this tribunal. While this decision is from the highest board provided for in the National Railway Labor Act as in many other matters of litigation, I share with you and no doubt others the feeling that no justice was accomplished in this decision. However, in reviewing the file I cannot think of any additional supporting facts which would have in any manner affected the decision in this case. May I at this time express my sincere appreciation for your co-operation in this matter. I assure you that this committee is very deeply concerned over this decision and sincerely shares with you the disappointment.

"Fraternally yours, L. E. Foley, General Chairman, BRT."

Q. Are there any additional communications from Mr. Foley to Mr. Price in your file?

(Deposition of D. R. Altier.)

A. I find none.

Q. Now, with the exception of the letter dated July 27th, 1949, signed by Mr. Price, is there any other communication in your file signed by Mr. Price? Well, let's see. Is there any other communication in your file to the Brotherhood of Railroad Trainmen signed by Mr. Price?

A. I find none.

Q. Is there any letter in your file signed by Mr. [11] Price requesting the Brotherhood of Railroad Trainmen to cease handling his case before the Railroad Adjustment Board? A. No, sir.

Mr. Cory: I have nothing further.

/s/ D. R. ALTIER,
Witness.

Subscribed and sworn to before me this 15th day of August, 1956.

[Seal] /s/ W. L. HEATHCOTE,
Notary Public in and for the County of Los Angeles, State of California. [12]

[Endorsed]: Filed July 13, 1956.

[Title of District Court and Cause.]

MOTION FOR LEAVE TO MOVE FOR SUMMARY JUDGMENT AND FOR SUMMARY JUDGMENT

The defendant, Union Pacific Railroad Company, a corporation, has heretofore moved the court to enter summary judgment in its favor, which motion was denied May 11, 1956. In view of admissions on the part of the plaintiff made subsequent to that date and in view of the contents of the deposition of D. R. Altier on file herein, said defendant now moves the court for leave to move again for summary judgment and also move the court for its order entering summary judgment for said defendant.

Notice of Motion

To: L. L. Price, Plaintiff, and Ralli, Rudiak & Horsey, His Attorneys.

You, and Each of You, Will Please Take Notice that on Friday, November 23, 1956, at 10:00 o'clock A.M., or as soon thereafter as counsel can be heard, at the court room of the Honorable Roger T. Foley, Judge, located in the Federal and Post Office Building at 301 Stewart Avenue, Las Vegas, Nevada, the defendant, Union Pacific Railroad Company, a corporation, will move the court for an order granting leave to make a motion for summary judgment and for an order granting summary judgment in favor of the defendant.

Said motion will be made pursuant to Rules 12(b) and 56 of the Federal Rules of Civil Procedure on the ground that the complaint fails to state a claim upon which relief can be granted and that there is no genuine issue as to any material fact in the above entitled action.

Said motion will be based upon this Notice, together with the Memorandum of Points and Authorities in support thereof and the Memorandum of Points and Authorities in support of said original motion for summary judgment. Said motion will also be based on the affidavit of Calvin M. Cory attached to said original Motion and the other papers attached to and filed in connection with said original Motion. Said motion will also be based on the affidavit of A. J. VanDercreek and the affidavit of H. J. Reeser on file herein and also upon the deposition of D. R. Altier on file herein and the provisions of the Constitution, Bylaws and Rules of the Brotherhood of Railroad Trainmen, as set forth in defendant's request for admission on file herein.

Dated: October 30, 1956.

E. E. BENNETT,
EDWARD C. RENWICK,
MALCOLM DAVIS,
CALVIN M. CORY,

/s/ CALVIN M. CORY,
/s/ By MALCOLM DAVIS,

Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed Nov. 6, 1956.

[Title of District Court and Cause.]

**MOTION AND NOTICE OF MOTION FOR
SUMMARY JUDGMENT ON BEHALF OF
DEFENDANT**

The Defendant, Union Pacific Railroad Company, a corporation, by Cory, Denton & Smith, its attorneys, hereby moves the Court to enter Summary Judgment for the Defendant, and in support of said motion in accordance with the provisions of Rule 56(b) of the Rules of Civil Procedure, the Defendant refers this Court to the Affidavit of Calvin M. Cory attached to the original Motion for Summary Judgment on Behalf of Defendant, the certified copy of Plaintiff's Submission and Award No. 15509 in Docket No. 27393 of the National Railroad Adjustment Board attached to the Defendant's original Motion for Summary Judgment, the original copy of the so-called Agreement, effective April 1, 1943, between the Union Pacific Railroad Company and the Brotherhood of Railroad Trainmen attached to Defendant's original Motion for Summary Judgment, the certified copy of Employee's Rebuttal to Carrier's Submission on file herein, all of the pleadings of record including the Answer of the Defendant, the affidavit of A. J. Vandercreek and the affidavit of H. J. Reeser on file herein, the deposition of D. R. Altier, General Chairman of the Brotherhood of Railroad Trainmen (South Central District) on file herein, the provisions of the Constitution, By-Laws and Rules

of the Brotherhood of Railroad Trainmen as set forth in Defendant's Answer and admitted by Plaintiff's failure and refusal to reply to Defendant's Request for Admissions on file herein. The Defendant further refers the Court to the attached Memorandum of Points and Authorities in support of this motion.

Notice of Motion

To: L. L. Price, Plaintiff, and Ralli, Rudiak & Horsey, His Attorneys:

You, and Each of You, Will Please Take Notice that on Monday, the 4th day of March, 1957, at 10:00 o'clock A.M. thereof, or as soon thereafter as counsel can be heard, at the Courtroom of the Honorable Roger T. Foley, located in the Federal and Post Office Building at 301 Stewart Avenue, Las Vegas, Nevada, the Defendant, Union Pacific Railroad Company, a corporation, will move the Court for an order granting summary judgment in favor of the Defendant.

Said motion will be made pursuant to Rules 12(b) and 56, Federal Rules of Civil Procedure, on the ground that the Complaint fails to state a claim against this Defendant upon which relief can be granted, that there is no genuine issue as to any material fact in the above entitled action, and that the pleadings, affidavits, exhibits, deposition and admissions on file herein show that the Defendant is entitled to judgment as a matter of law.

Plaintiff's Complaint purports to state a cause of action based upon an alleged wrongful dismissal in violation of the terms of a certain collective bargaining agreement effective April 1, 1943, between the Brotherhood of Railway Trainmen and the Defendant.

This petitioning Defendant alleges that any judicially enforceable cause of action arising from the termination of the employment relationship between Plaintiff and the Defendant is now barred by the adjudication and determination of the validity of such termination by the National Railroad Adjustment Board under the terms and conditions of said collective bargaining agreement, and pursuant to and in conformance with the Railway Labor Act (45 U.S.C.A. Sec. 151, et seq.)

Said motion will be based upon this Notice of Motion, together with the Memorandum of Points and Authorities in support thereof attached hereto, the Affidavits of Calvin M. Cory attached to the original Motion for Summary Judgment and all other papers attached to or filed in connection with said original Motion for Summary Judgment; the affidavits of A. J. Vandercreek and H. J. Reeser, and the Deposition of D. R. Altier, all of which are on file herein, as well as the Constitution, By-Laws and Rules of the Brotherhood of Railroad Trainmen, as set forth in Defendant's Request for Admission on file herein, and all of the pleadings and papers on file herein.

Dated: January 21, 1957.

**E. E. BENNETT,
EDWARD C. RENWICK,
MALCOLM DAVIS,
CORY, DENTON & SMITH,**

/s/ **By CALVIN M. CORY,**
Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed Jan. 21, 1957.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the parties hereto, through their respective counsel of record, that at all times mentioned in the complaint, and pertinent to this action, the constitution of the Brotherhood of Railroad Trainmen contained the following sections:

“Dues—When Payable.

“Sec. 129. The dues of members shall be paid monthly in advance, before the first day of each month, to the treasurer, or collector (when such office exists), and shall be conditioned upon the class of certificate held in the Insurance Department, and shall not be less than the amount of the monthly assessment levied by the General Secretary and Treasurer on each certificate. All members admitted or readmitted must pay dues for the

month in which they are admitted or readmitted."

"Expelled For Non-Payment of Dues.

"Sec. 141. Any member failing or refusing to pay his dues and assessments, as required by Section 129, becomes expelled without any notice or further action whatsoever and at that instant any and all insurance certificates held by him shall be void, and all rights and benefits of insurance membership shall cease and be determined. If a lodge advances a member money for the payment of dues, he shall be required to repay the same within the time set by the lodge for such repayment, or shall become expelled as for non-payment of dues. The minutes of the lodge should show the time set for the repayment of money so advanced for this purpose.

"Where it is proven that a member has been expelled and readmitted through the fraudulent action of the local treasurer without said member's knowledge, said member shall be granted continuous membership."

It Is Further Stipulated and Agreed that at all times mentioned in the complaint and pertinent to this action, Rule No. 5 of the Brotherhood of Railroad Trainmen read as follows:

"Consideration of Grievances.

"No. 5. Any member considering that he has

been unjustly dealt with by his employer, or that he is otherwise aggrieved or is denied compensation for time lost and expenses incurred by sustaining minor personal injuries in line of service, shall make a comprehensive statement of the grievance in writing containing all of the material facts necessary for a clear understanding of the grievance and present or mail the same to the secretary of his lodge for handling at the next regular meeting. The lodge shall then determine by a majority vote of the members present, employees of the division, whether to sustain or reject the grievance. Should the grievance be sustained, the lodge will then authorize either the local chairman or the local grievance committee to lay the matter before the trainmaster, superintendent, or other proper officer, and use every means to effect a satisfactory settlement, and report his or their action and all things pertaining to the case to the lodge. If the result is not satisfactory, it may be referred to the general grievance committee for further action. A member or a lodge may withdraw a grievance placed in the hands of a general grievance committee, provided such action is taken before said grievance has been presented by the general grievance committee to the officer of the company, but not thereafter. All grievances must be handled by the regular local grievance committee, or by the local chairman if the lodge so directs, before being referred to the general grievance committee for adjustment. Grievances pertaining solely to members employed on a particular road or division or bus line shall

be disposed of by a majority vote of the members of the lodge who are employed on such road or division or bus line; provided that at least five such members must be present to take action upon such grievance. On small systems where the office of general chairman is maintained, upon the request of all lodges on such systems, the President of the Brotherhood may issue dispensation permitting the general chairman to handle local grievances."

Dated this 20th day of May, 1957.

/s/ SAMUEL S. LIONEL,
Attorney for Plaintiff.

E. E. BENNETT,
EDWARD C. RENWICK,
MALCOLM DAVIS,
CORY, DENTON & SMITH,

/s/ By CALVIN M. CORY,
Attorneys for Defendant.

Approved:

/s/ JOHN R. ROSS,
United States District Judge.

May 21st, 1957.

[Endorsed]: Filed May 21, 1957.

**In the United States District Court
for the District of Nevada**

No. 117

L. L. PRICE,**Plaintiff,****vs.****UNION PACIFIC RAILROAD, Defendant.**

**ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT**

The defendant's motion for summary judgment came on for argument this 22nd day of May, 1957, Calvin M. Cory appearing for the defendant, and Samuel S. Lionel appearing for the plaintiff, and the matter being argued and by the Court fully considered the Court finds from the pleadings, admissions, and affidavits on file that there is no genuine issue of any material fact and that the defendant is entitled to a judgment as a matter of law, and that such showing has not been successfully controverted by the plaintiff; now, therefore, and good cause appearing, it is

Ordered, that the motion of the defendant for summary judgment be and the same is hereby granted.

Dated at Las Vegas, Nevada, this 22nd day of May, 1957.

/s/ JOHN R. ROSS,

United States District Judge.

[Endorsed]: Filed May 24, 1957.

[Title of District Court and Cause.]

DOCKET ENTRY OF MAY 24, 1957

Filing & Entering Order Granting Motion for Summary Judgment. Judgment: Ordered that defendant's Motion for Summary Judgment be and the same is hereby granted.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that L. L. Price, plaintiff above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order granting defendant's Motion for Summary Judgment, entered in this action on May 24, 1957.

Dated this 21st day of June, 1957.

/s/ SAMUEL S. LIONEL,
Attorney for Appellant.

[Endorsed]: Filed June 21, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Oliver F. Pratt, Clerk of the United States District Court for the District of Nevada, do hereby certify that the attached and accompanying documents are the originals filed in this Court, or true

and correct copies thereof, as called for by the Designation of Contents of Record on Appeal filed herein by the appellant and the appellee, and they constitute the record on appeal herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 15th day of July, A.D., 1957.

[Seal]

OLIVER F. PRATT,

Clerk,

/s/ By FRANCES PETTINGILL,

Deputy Clerk.

[Endorsed]: No. 15649. United States Court of Appeals for the Ninth Circuit. L. L. Price, Appellant, vs. Union Pacific Railroad, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed: July 17, 1957.

Docketed: July 31, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15649

L. L. PRICE,

Appellant,

vs.

UNION PACIFIC RAILROAD,

Appellee.

STATEMENT OF POINTS

Pursuant to Rule 17, the appellant hereby states that the point upon which he intends to rely in his appeal from the Summary Judgment herein is as follows:

1. The Court erred in holding that the award of the National Railroad Adjustment Board entitled the appellee to Summary Judgment.

(The appellant does not rely on any claim that he did not authorize the submission of his case to the National Railroad Adjustment Board.)

/s/ SAMUEL S. LIONEL,
Attorney for Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 30, 1957. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD ON APPEAL

Pursuant to Rule 17, the appellant hereby designates the following portions of the record as material to the consideration of the appeal from the Summary Judgment herein:

1. Complaint.
2. Defendant's Answer to Complaint.
3. Motion for Leave to Move for Summary Judgment and for Summary Judgment and Notice of Motion, dated October 30, 1956.
4. Plaintiff's Submission and Award 15509 in Docket No. 27393 of the National Railroad Adjustment Board, attached to defendant's Motion and Notice of Motion for Summary Judgment, dated July 12, 1955.
5. Order Granting Motion for Summary Judgment, filed May 24, 1957.
6. Notice of Appeal, filed June 21, 1957.
7. Statement of Points, served herewith.
8. Designation of Record on Appeal, under Rule 17.

/s/ SAMUEL S. LIONEL,
Attorney for Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 30, 1957. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION BY APPELLEE OF ADDITIONAL PORTIONS OF RECORD ON APPEAL

In conformance with Rule 17 of the Rules of the U. S. Court of Appeals for the Ninth Circuit, the Appellee designates the following additional parts of the record which are material and which should be a part of the printed record:

1. Agreement between the Union Pacific Railroad Company and the Brotherhood of Railroad Trainmen effective April 1, 1943, and attached to defendant's original Motion for Summary Judgment filed July 12, 1955.
2. Motion and Notice of Motion for Summary Judgment on behalf of defendant, dated January 21, 1957, filed January 21, 1957.
3. Request for Admission served upon the plaintiff the 28th day of June, 1956, and filed July 6, 1956.
4. Affidavit of A. J. Vandercreek executed May 8, 1956, and filed on the 10th day of May, 1956.
5. Employees' Rebuttal to Carrier's Submission dated April 10, 1951, in Docket No. 27393 of the National Railroad Adjustment Board, First Division, attached to Defendant's Motion and Notice of Motion for Summary Judgment, dated July 12, 1955.

6. Deposition of D. R. Altier filed August 27, 1956.

7. Stipulation dated May 20, 1957, and filed the 21st day of May, 1957, concerning portions of the constitution and by-laws of the Brotherhood of Railroad Trainmen.

8. This designation.

Dated: July 31, 1957.

E. E. BENNETT,
EDWARD C. RENWICK,
MALCOLM DAVIS,
CORY, DENTON & SMITH,

/s/ By CALVIN M. CORY,
Attorneys for Appellee.

Acknowledgment of Service Attached.

[Endorsed]: Filed Aug. 5, 1957. Paul P. O'Brien,
Clerk.

[fol. 101]

**IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Minute entry of argument and submission—March 8, 1958 (omitted in printing).

[fol. 102]

IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Before: Healy, Pope and Hamley, Circuit Judges.

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINIONS
AND FILING AND RECORDING OF JUDGMENT—May 20, 1958

Ordered that the typewritten opinion, and dissenting opinion of Healy, Circuit Judge, this day rendered by this Court in above cause, be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the majority opinion rendered.

[fol. 103]

IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15,649—May 20, 1958

L. L. PRICE, Appellant,

vs.

UNION PACIFIC RAILROAD, Appellee.

Upon Appeal from the United States District Court for the District of Nevada.

OPINION

Before: Healy, Pope, and Hamley, Circuit Judges,

HAMLEY, Circuit Judge:

L. L. Price brought this action against Union Pacific Railroad Company, to recover damages in the amount of \$118,517, alleging that he had been wrongfully dismissed as a trainman.

After the filing of an answer and the obtaining of certain admissions, defendant moved for a summary judgment. The motion was made on the ground that a determination made by the National Railroad Adjustment Board (Board) that the dismissal was valid precluded this independent court action. Agreeing with this view, the trial court granted summary judgment for defendant. Plaintiff appeals.

The single question presented on this appeal is whether, in view of the action of the Board in denying Price's claim for restoration with all rights unimpaired, and for back pay, the trial court was without jurisdiction to entertain this independent court action for damages.

Price had been employed by the railroad as a brakeman on its South Central District, operating out of Las Vegas, [fol. 104] Nevada. On July 12, 1949, he was instructed to deadhead on a 9:15 p. m. train to Nipton, California, a distance of 56.7 miles, for swing service at Nipton. He reached Nipton at 10:25 p. m., and telephoned the Las Vegas train dispatcher. The dispatcher told him to wait at Nipton until 4:00 a. m., at which time he was to serve as a swing brakeman on a train due at that hour.

Price, however, told the dispatcher that there was no place to eat or sleep in Nipton, and that he would return to Las Vegas on the first eastbound train. The dispatcher told Price not to do this, but he nevertheless returned to Las Vegas on a train which reached there at 12:35 a. m., on July 13. After obtaining food in Las Vegas, Price called the train dispatcher and stated that he was ready to return to Nipton on a train due to depart at 1:45 a. m. The dispatcher instructed Price not to return to Nipton.

On July 16, 1949, the railroad charged Price with violating operating rules 700 and 702. He was given written notice at that time to appear for investigation and hearing on these charges at 10:00 a. m., on the following day. Price appeared at the specified time and place, and requested a postponement upon the ground that his union representative was not present. A postponement until 9:30 the following morning was granted.

At this postponed hearing, Price requested a further postponement on the ground that his representative was still not available. He was then told that the investigation and

hearing would be deferred until 2:30 p. m., and was advised to get another representative.

Price did not appear at 2:30 p. m., and a hearing was conducted in his absence. Questions were propounded of various employees by an assistant superintendent, and a record of the proceedings was transcribed. On July 24, 1949, Price was discharged from the service of the carrier.

Price requested the Brotherhood of Railway Trainmen to seek his reinstatement with pay for time lost and all seniority and other rights restored. The Brotherhood negotiated with the railroad, as a result of which the latter offered to take Price back on a leniency basis. Price rejected this offer.

[fol. 105] On January 11, 1951, Price's claim for restoration to service with all rights unimpaired and for back pay was submitted by the Brotherhood, in behalf of Price, to the Board.¹ On June 25, 1952, the Board issued an award denying Price's claim in its entirety. On June 6, 1953, Price instituted this suit for damages in the District Court of the United States for the District of Nevada. Jurisdiction of the district court is based on diversity of citizenship.

As before indicated, the railroad was granted summary judgment on the ground that the Board award denying Price's claim barred this independent court action for damages. On this appeal, Price argues that a Board award denying the claim of a discharged employee does not preclude a subsequent independent court action for damages. Alternatively, he argues, if a Board award has such finality, it is only where the Board has made a determination on the merits, and no such determination was made in this case.

Under the act, an employee who believes that he has been wrongfully discharged may petition the Board for a redress of his grievance. Upon the filing of such a petition, the appropriate division of the Board is authorized to conduct a hearing, make findings, and issue an award in writing. If the award is in favor of the petitioner, the Board is to issue an order directing the carrier to make the award effective.

¹ Pursuant to § 3, First (i) of the Railway Labor Act (act), as amended, 45 U.S.C.A., § 153, First (i).

If the carrier does not comply, the petitioner may institute an enforcement proceeding in the district court.²

Instead of pursuing this administrative remedy, however, an employee may seek relief by way of an independent court action, providing the state law does not require him to first exhaust his administrative remedies.³ If, however, the ag-[fol. 106] grieved employee elects to proceed with his administrative remedy, and there obtains an adjudication on the merits, the award is "final and binding" upon both parties to the dispute, except in so far as it shall contain a money award.⁴

When such an award is adverse to the petitioner, he may nevertheless seek review thereof on a ground amounting to a denial of due process of law. *Ellerd v. Southern Pacific Railroad Co.* (7 Cir.), 241 F.2d 541. He may not, however, institute an independent court action to recover damages or obtain other relief.

In the present action, Price did not seek a review of the Board award. This is an independent suit for damages. Under the principles stated above, therefore, the court was without jurisdiction to entertain the action if the Board award represents a determination on the merits.

The question on the merits in this controversy is whether, under the terms of employment and the circumstances of this case, the railroad was entitled to discharge Price because of his return from Nipton to Las Vegas contrary to the direc-

² Section 3, First (i)-(p) of the act, as amended, 45 U.S.C.A., § 153, First (i)-(p).

³ *Moore v. Illinois Central Railroad Company*, 312 U. S. 630; *Transcontinental & West. Air. v. Koppal*, 345 U. S. 653. It is not here contended that the law of Nevada required Price to exhaust the administrative remedy before instituting this court action.

⁴ Section 3, First (m) of the act, as amended, 45 U.S.C.A., § 153, First (m); *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U. S. 711, reargued 327 U. S. 661; *Washington Terminal Co. v. Boswell* (D.C. Cir.), 124 F.2d 235, affirmed per curiam by an equally divided vote, 319 U. S. 732. That the award must represent an adjudication on the merits in order to be final and binding, see *Michel v. Louisville & N. R. Co.* (5 Cir.), 188 F.2d 224, 226; *Washington Terminal Co. v. Boswell*, supra, page 249; *Koelker v. Baltimore and Ohio Railroad Co.*, 140 F. Supp. 887, 889.

tions of the train dispatcher. This was one of the two questions which Price submitted for Board determination. The other question which Price submitted to the Board was whether, prior to his discharge, he was accorded the kind of a hearing prescribed in the agreement between the railroad and the Brotherhood governing wages and working conditions.

In denying Price's claim, the First Division of the Board said:

"If the carrier is to have efficient operations on its railroad, employes must be relied on to obey operating instructions and orders. Claimant was found to have wilfully disobeyed his orders. This was insubordination and merited discipline.

[fol. 107] "The employe has been tendered reinstatement on a leniency basis but seeks complete vindication on the grounds that he was denied the investigation provided by the rules of agreement. Thus, the only question for review is whether there was substantial compliance with the investigation rule.

"Basically, the complaint is that the hearing was held when the claimant was not present."

The Board then proceeded to discuss the manner in which the investigation was conducted by the carrier. It was concluded that none of Price's rights in that regard was abridged. The claim was accordingly denied.

It therefore appears that the Board made no determination on the merits of Price's complaint. The Board neither found nor concluded that the railroad was entitled to discharge Price. The written decision of the Board does not even mention this issue other than to report that "claimant was found to have wilfully disobeyed his orders." The finding thus reported was obviously not its own, but that of the superintendent of the railroad.

The reason that the Board did not deal with the merits of the controversy is that it believed, as stated in its decision, that "the only question for review is whether there was substantial compliance with the investigation rule." This was a plain misconstruction of Price's submission to the board,

since he had specifically presented the question on the merits.⁵

[fol. 108] Appellee argues that, if Price believed that the award did not represent a determination on the merits, he could have obtained an interpretation under the "finality" provision of the act.⁶

There was here no dispute "involving an interpretation of the award," as those words are used in the statute. The "award" was an outright denial of the claim,⁷ as all parties concede. The statutory provision under which an interpretation of an award may be obtained does not, in our opinion, apply where the only dispute concerns the grounds relied upon in making an unambiguous award.

We conclude that Price did not obtain an adjudication upon the merits in the proceedings before the Board, and that the trial court therefore had jurisdiction to entertain this independent action for damages.

Reversed and remanded for further proceedings not inconsistent with this opinion.

⁵ In the submission to the Board, on behalf of Price, complaint was made of the procedure followed during the railroad's investigation of the incident leading to his discharge. It was then stated:

"The employees further contend that Brakeman Price did not violate any rules of leaving Nipton to secure food. That Brakeman Price was justified in these actions is supported by the provisions of Section (b) of Article 32 of the agreement effective April 1, 1943, reading as follows:

"Swing brakemen will not be tied up nor released at points where sleeping and eating accommodations are not available."

This statement was followed by a detailed discussion of the reasons why the railroad was not entitled to discharge Price, under the circumstances of this case:

⁶ The last sentence of § 3, First (m) of the act, as amended, 45 U.S.C.A., § 153, First (m), reads: "In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute."

⁷ The Board decision ends with these words: "Award: Claim denied."

HEALY, Circuit Judge, Dissenting:

I am unable to go along with the holding of my associates that the Board made no disposition of the merits of appellant's complaint.

The Union, in its submission to the Board, admitted that appellant left Nipton and returned to Las Vegas; and it was not disputed that in doing so he deliberately disobeyed an order of the dispatcher. The Union sought to justify this admitted infraction of an operating order by reference to Section (b) of Article 32 of the Agreement, quoted by my associates in their footnote 5. In disposing of the case the Board, among other things, stated: "If the carrier is to have efficient operations on its railroad, employees must be relied on to obey operating instructions and orders."

It appears to me plain that the Board was of opinion, and in substance held, that the asserted violation by the Company of Article 32, even if true, would not serve to justify [fol. 109] an employee's violation of direct operating instructions and his abandonment of his post. Such a ruling would appear to promote safety in railroad operations, which must always take into account considerations of that nature.¹ With its intimate knowledge of the field, the Board is peculiarly equipped to make such a decision.

[File endorsement omitted]

¹ Section one of the Railway Labor Act, 45 USCA §151, under subdivision "Fifth" defines "employee" thus:

"The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) . . ."

Section two of the Act, 45 USCA §151(a)(1), under the heading "General purposes," states one of its purposes to be:

"to avoid any interruption to commerce or to the operation of any carrier engaged therein; . . ."

[fol. 110]

IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15649

L. L. PRICE, Appellant,

VS.

UNION PACIFIC RAILROAD, Appellee.

JUDGMENT—Entered May 20, 1958

Appeal from the United States District Court for the District of Nevada.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the said District Court in this cause be, and hereby is reversed, with costs in favor of the Appellant and against the Appellee, and that this cause be, and hereby is remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

It Is Further Ordered and adjudged by this Court that the Appellant recover against the Appellee for his costs herein expended and have execution therefor.

[File endorsement omitted]

[fol. 111]

IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Before: Healy, Pope and Hamley, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING—July 7, 1958

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of Appellee, filed June 18, 1958, and within time allowed therefor by rule of court for a rehearing of the above cause be, and hereby is denied.

HEALY, Circuit Judge, dissenting.

[fol. 112] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 113]

SUPREME COURT OF THE UNITED STATES

No. 414—October Term, 1958

UNION PACIFIC RAILROAD COMPANY, Petitioner;

VS.

L. L. PRICE

ORDER ALLOWING CERTIORARI—November 17, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and case transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.